

OPINIONS

OF THE

Corporation Counsel and Assistants

OF THE

City of Chicago

FROM

April 16, 1927 to April 15, 1928

VOLUME XVI

SAMUEL A. ETTELSON

Corporation Counsel

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CORPORATION COUNSELS OF CHICAGO

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MURRAY F. TULEY.....	Dec. 20, 1869
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FOREWORD

It has been the custom since 1897, at more or less regular intervals, to publish in book form the Opinions of the Corporation Counsel which are of general or permanent interest to the City Council and the executive officers of the Corporation.

The first volume published contains opinions dated from 1874 to 1897, but apparently covers opinions from 1872 to 1897, a period of 25 years. The second volume comprises opinions of part of 1897 to the early part of 1905, a period of eight years. The third volume is for a period of two years from 1905 to 1907. All of the other volumes cover annual periods except those for 1908-1911, for 1916-1919 and for 1920-1923, each covering three year periods.

Commencing with this volume the opinions selected for publication have been carefully analyzed and summarized. This has made it possible to produce a thorough and more extensive index and should save a substantial amount of time to those who may be called upon to use the book.

The initials following the date of an opinion designate the assistant who wrote it, the full name of these assistants being as follows: JAMES W. BREEN, LEON HORNSTEIN, JOHN G. DRENNAN, EDWARD C. HIGGINS, JOHN LEWSON, FRANK J. CORR, MARTIN H. FOSS, A. O. GALVIN, CHARLES W. KOPF, ROY N. LESCH, M. J. MALONEY, JAMES I. MCCARTHY, GEORGE F. MULLIGAN, FRANCIS J. VURPILLAT, HENRY H. PROCTOR, ALBERT H. VEEDER, JAMES N. KEARNS, STANLEY C. ARMSTRONG, CARL H. LUNDQUIST, FRANK A. WRIGHT, FRANK T. HUENING and JAMES J. COUGHLIN.

SAMUEL A. ETTIELSON,
Corporation Counsel.

OPINIONS
OF THE
Corporation Counsel and Assistants
OF THE
City of Chicago
FROM
APRIL 16, 1927 TO APRIL 15, 1928

(No. 5999—April 16, 1927—F. J. V.)

1 POLICE, DETAILING. CIVIL SERVICE.

A lieutenant of detectives may be detailed to the position of Deputy Chief of Detectives without certification from the Civil Service Commission in the absence of an eligible list.

2 WORDS AND PHRASES.

The word "detailed" in the Appropriation Ordinance does not contemplate civil service certification as a prerequisite.

Hon. Michael Hughes, Acting Superintendent of Police:

Replying to your oral request for an opinion as to the eligibility of Lieutenant of Detectives Michael Grady to be "detailed as Deputy Chief of Detectives," we may state that there is no eligible list created and kept by the Civil Service Commission from which such appointment may be made. The word "detailed" used in the appropriation ordinance indicates that no request for certification need be made upon the Commission, nor that such certification is

required in detailing one from the department to the position of deputy chief of detectives.

We are therefore of the opinion that for the time the Superintendent of Police is empowered to make such appointment without the Civil Service Commission's action, and to detail Michael Grady to the position of Deputy Chief of Detectives.

(No. 6000—April 18, 1927—L. H.)

1 PUBLIC WORKS, COMMISSIONER OF, STRIKES.

In case of an actual emergency such as a strike, it is within the power, and it is the duty of the Commissioner of Public Works, to order coal from others than the contractor who is unable to deliver coal according to agreement, especially when there is a provision in the specifications recognizing that right.

2 CONTRACTORS, COAL, EXTRA COMPENSATION.

Extra or additional compensation cannot be awarded for coal ordered during a strike from other fields than those named in the specifications under a contract which provides that the price for coal shall fluctuate according to the miners' wage scale or freight rate, and the contract fails to allow a higher rate on account of shipments from other fields.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of the 15th instant, in which you ask certain questions with respect to the proper action to be taken to secure necessary coal for the City's pumping stations during the strike now pending in the coal fields where the contractor for such coal is operating. Accompanying your letter is a blank form containing instructions to bidders, proposal, specifications, contract and bond. We assume that these have all been duly complied with, and the documents signed and executed, and we predicate our opinion on that theory. We also take into account the letter of the contractor dated March 23, 1927, which we are told arrived after the bid was submitted, and the copy of the letter from the contractor dated April 14,

1927, in which notice of the strike and the inability to furnish coal is given.

It appears from the documents and data thus submitted that the contractor, Binkley Coal Company, is unable to furnish coal from the mines accepted under the specifications, and that "in accordance with other provisions of the specifications," they are offering coal from the Western Kentucky field. On account of increased freight rates and the difficulty of obtaining coal from the new connections, the contractor is submitting a claim for an increase in price.

You state in your letter that "such a change would be in the nature of an extra, and, of course, will require Council action." You then ask for an opinion as to the propriety of directing the contractor to furnish coal to the City's water pumping stations, some of which have not a sufficient supply to wait for formal Council action.

While you do not ask for an opinion as to the right of the City Council to authorize a higher price to the contractor, we beg to say in passing that it is at least doubtful whether the Council has such power. We deem it proper to say this, lest our failure to mention it would be construed as an acquiescence in the inference that the Council has the matter of additional compensation within its control. On page 5 of the specifications we find a provision to the effect that if the miners' wage scale or the freight rate is increased or decreased the price of the coal will fluctuate accordingly; and on page 3 authority is given to ship from another designated mine, subject to the approval of the commissioner, but no allowance for a higher freight rate on account of a different point of shipment is contemplated.

On the question as to whether you have the authority to order coal when you are unable to get what is necessary

for the pumping stations there can be no doubt whatever. You have that power, and the matter is entirely within your reasonable control and discretion. You can order such coal from the contractor, or purchase it on the open market. And if, in your discretion, the emergency is great enough to warrant it, you have the right to incur additional expense for which the City is liable.

On page 10 of the specifications the following appears as part of the agreement entered into:

“Should the Contractor fail to deliver the coal as herein stipulated, the City, at its option, may cancel the then unexpired portion of this contract, or the City may purchase coal in the open market to such a quantity as the Contractor shall fail to deliver, in which case all costs and expenses in excess of the Price Bid shall be paid for by said Contractor.”

This provision is not affected by the letter of the contractor above referred to, under date of March 23, 1927, wherein it is stated that the bids are made “subject to delays caused by strikes beyond the bidder’s control.” Not only did this notice come too late to be considered as part of the bid, but there would have been a material variance from the specifications had it been made a part of the bid in apt time, and the bid would in consequence have been outside of the competition.

In addition to the conditions fixed by the specifications as above set forth, there is specific authority in the body of the contract under which the Commissioner of Public Works, in cases of default, may declare the contract forfeited and to relet the same or any portion thereof. Between the two provisions mentioned, the Commissioner has ample power to protect the rights of the City with respect to the supply of coal and with respect to the charges of the contractor. The only limitation is that the Commissioner must be sure that there is a default on the part

of the contractor and must act on reasonable cause and in a reasonable manner. If there is a real emergency, it is not only right for him to act, but it is his duty to protect the City and its inhabitants against the consequences of a failure on the part of the contractor to supply coal. This may even extend so far as to leave open the question of whether or not the contractor is entitled to extra compensation, although this is not desirable because it invariably leads to a lawsuit wherein such extra compensation is claimed.

(No. 6001—April 21, 1927—F. J. V.)

SALARIES AND WAGES, COLLECTION BY WIFE, AFFIDAVIT AND RECEIPT.

The pay check of a wife deserter who was in the city's employ may be turned over to the wife upon the execution by her of an identification receipt supported by an affidavit giving a full description of the amount due, stating the reason the husband left, his whereabouts and the purpose for which the money is needed.

Mr. Joseph J. Butler, Deputy Superintendent of Streets:

We are submitting herewith our opinion in the matter of the paymaster's delivery to Mrs. Harry Hammerschlag of the pay check belonging to her husband, Harry Hammerschlag, who, as she states, has left the City and whose whereabouts are said to be unknown. Mrs. Hammerschlag further states that she "wants to collect this money in order to pay her rent which is now overdue."

We think such delivery may be properly and legally made upon the following conditions first to be complied with, to-wit:

First, cause Mrs. Hammerschlag to place the following endorsement upon the accompanying "Identification and

Receipt," which refers to "Pay Roll, line No. 39, No. 3345, days 4, amount \$20.60, bearing date Feb. 7, 1927, issued by Ray F. Stanton, Jr., of the Department of Public Works. Bureau of Streets," also upon the pay check:

Harry Hammerschlag,
By Mrs. Harry Hammerschlag, his wife,
this day of, A. D. 1927.

Second, cause Mrs. Harry Hammerschlag to subscribe and be sworn to before a notary public, or any officer authorized to administer oaths, the affidavit attached hereto which should be kept in the files with the "Identification and Receipt" endorsed by her.

A copy of said affidavit is set out here as part of the foregoing opinion, to-wit:

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Mrs. Harry Hammerschlag, being first duly sworn, deposes and says that she is the wife of Harry Hammerschlag, to whom was issued an "Identification and Receipt" based on Pay Roll, line No. 39, No. 3345, in the amount of \$20.60 for four days service in the Bureau of Streets, Department of Public Works of Chicago, of date February 7, 1927, issued by Ray F. Stanton, Jr., of said Department; that as such wife she makes application for the delivery to her of the pay check for said sum due for said services; that said services were rendered for the period ending January 31st. 1927. To support this application, affiant states the facts to be that since said January 31st, 1927, her said husband, Harry Hammerschlag, without cause has left this affiant and their home; that since that time the whereabouts of her said husband have been and are now unknown; that the rent for their home is past due and unpaid and that she is in need of said sum of money now due her absent husband. Affiant further says that she "wants to collect this money in order to pay her rent which is now

overdue" and that she makes this application and affidavit in support thereof for this purpose and for no other purpose whatever, and also endorses said identification and receipt for such purpose, in the name of Harry Hammerschlag by herself as his wife.

Subscribed and sworn to before me this day
of, A. D. 1927.

.....
Notary Public.

(No. 6002—April 21, 1927—S. C. A.)

FILLING STATIONS, BOULEVARDS.

The erection of filling stations either on boulevards or at the intersection of two boulevards, is not prohibited by ordinance.

Mr. R. M. Taylor, 1348 Rosemont Ave., Chicago, Illinois:

We have your letter of April 19th in which you ask for a reference to a city ordinance prohibiting a gas filling station on the corner of two boulevards within the city limits of Chicago.

There is no ordinance prohibiting the erection of a filling station on either a boulevard or at the intersection of two boulevards, provided the applicant has secured the necessary frontage consents, and also provided that the location of the proposed station is a requisite distance from a school, church, hospital or theater.

(No. 6003—April 22, 1927—M. J. M.)

RIPARIAN RIGHTS, CONDEMNATION.

Riparian rights along the shores of Lake Michigan can be acquired for public purposes only upon payment of compensation.

Mr. James Molloy, 349 Scott Avenue, Grand Rapids, Michigan:

Your letter of April 18th, 1927, to the City Clerk of this City has been referred to me for attention. In reply thereto I desire to say that the statutes in our State have many provisions with reference to the questions that you ask.

It is provided in chapter 19 of the Illinois Revised Statutes of 1925, of which the act entitled "Illinois Waterway Act" is a part, that the acquisition of riparian rights and land along the shores of Lake Michigan by the City, or any other public body, is subject to the general law of eminent domain, that is that all land so acquired is subject to the payment of compensation by the body acquiring this land or riparian rights.

Section 7 of the Illinois Waterway Act provides that the Department of Public Works and Buildings has the right "to acquire by donation, purchase contract or exchange any property, real or personal, necessary or incident to the construction, maintenance, equipment, operation or repair of the waterway and its appurtenances. To acquire by condemnation under the eminent domain law of this State all property necessary to be taken or damaged for the construction, maintenance or operation of such waterway and its appurtenances."

Chapter 105 of the Revised Statutes of Illinois of 1925 includes "An Act to enable the corporate authorities of

two or more towns for park purposes to alter or enlarge the parks under their control."

Section 1 of this act provides that "in all cases where lands within a specified boundary bordering on public waters in this state have been declared to be a public park, and where the commissioners of such park have been named in the act establishing the same and their successors have since been appointed by the governor of the state, said commissioners of any such park shall have power from time to time, in their discretion, to enlarge the same by reclaiming such lands under such public waters in the following manner."

The act then describes the manner in which the park board may acquire the land.

Section 2 of said act provides that "the commissioners shall have the power to acquire by contract or with deeds from the private owner of riparian rights such riparian rights, and in case of their inability to agree with such owner they may proceed to condemn such rights and such land according to the provisions of article 9 of an act entitled 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, and the amendments thereof."

All these acts provide for the payment of compensation to the riparian owners where damage accrues to them by reason of limiting or taking away their riparian rights.

(No. 6004—April 22, 1927—S. C. A.)

FRONTAGE CONSENT, JOINT TENANT.

A joint tenant may give frontage consent proportionate to his interest the same as a tenant in common.

Mr. John Plant, Chief Fire Prevention Engineer:

You have submitted to this department application of the estate of Morris Cohen to install three 1,000 gallon tanks for a filling station at 5257 S. Ashland avenue; also consents to locate tanks for the sale or storage of oils together with report of Superintendent of Maps showing consent of a sufficient frontage with a surplus of 19.06 feet; also an affidavit of Henry Flamm to the effect that Henry Flamm and Mary Flamm, his wife, are the owners in joint tenancy of lot 26 of the property appearing on the consent; that he, Flamm, as the owner of an undivided half of said property, gave and signed his consent to the location of said filling station, but that his wife Mary Flamm, since the 5th day of December, 1926, has not been out of the custody of sanitarium or asylum authorities; that the name Mary Flamm appears upon the said consent to locate tanks but that said Mary Flamm did not sign nor consent thereto and that the signature of Mary Flamm is false and a forgery.

You request an opinion as to what action should be taken by your bureau.

The Flamm property is a 25 foot lot and should this 25 feet be excluded from the totals of the consenting property owners, there will be lacking 5.94 feet of a majority of the total frontage. However, William Flamm did give his consent. Therefore the question to be solved is whether all or any part of the Flamm property should be included or excluded in computing the necessary frontage consents.

In the case of *People v. Griesbach*, 211 Ill. page 35, which involved a license for a dramshop in Hyde Park which required frontage consents, the court said:

“The application purported to contain the names of the owners of 2,347.13 feet of such frontage, being an apparent excess of 94.16 feet over the requisite amount. Of the frontage so appearing on the application, 250 feet thereof was owned by five tenants in common, four, only, of whom signed the application. The trial court ruled the signatures of these four tenants in common should be accepted as representing 200 feet of the frontage of 250 feet owned by the five tenants in common. Counsel for the People contend that the signatures of tenants in common cannot be accepted as representing a proportionate part of the entire frontage of the common property.

“It is true, as argued, that tenants in common are seized of each and every part of the estate, and that one of such tenants has no power to convey the whole of the estate or the whole of any distinct part or portion of it or to give a valid release for injuries done to it, and that one tenant in common cannot lawfully do any act that will work a permanent injury to the inheritance. But the argument that as a license to keep a dram-shop cannot, under the ordinance in question, be lawfully granted except upon the application and consent of a majority of the property owners, etc., it must be considered by the courts that the keeping of a dram-shop in the block is detrimental and injurious to the property abutting on the streets which surround the block, and that for that reason a tenant in common cannot be allowed to consent to that which must, as a matter of law, be considered to be injurious and detrimental to the common property, is not sound. The statutes provide for the presentation of petitions for the construction of local improvements by special taxation or special assessments, for the opening of highways, the creation of drainage districts and of towns under township organization, and perhaps for other objects and purposes. Petitions are not required in such cases for the reason that the objects to be attained by the petition are to be deemed prejudicial or injurious in their nature, and therefore only to be

granted in case those, or a portion of those, who will be prejudicially affected thereby shall signify their consent by way of a petition. Whether such objects are desirable and beneficial or prejudicial and detrimental are questions upon which the minds of those interested do not always agree, and the purpose of the provisions for petitions is to discover and give effect to the views and wishes of the greater number of those who are interested in the subject matter of the petition. The same is true as to the application for license to keep dram-shops, and courts will not declare, as matter of law, that dram-shops are prejudicial and injurious to real estate in the vicinity because the ordinance in question prohibits the issuing of licenses to keep such shops except upon the application of a majority of the owners of such real estate. The signing of such a petition by a tenant in common cannot be declared, as a matter of law, to be detrimental or injurious to the estate of himself and his co-tenants. Whether the establishment of a dram-shop in the block surrounded by the streets upon which the common property abuts is injurious or beneficial to the property is a question upon which each tenant in common has the right to judge for himself, and we think each of such tenants in common has the right to sign such a petition as the representative of his proportionate interest in the property according to the frontage thereof. If this were not true, any one tenant in common, no matter how small his interest, would be given, by law, the power to determine for his co-tenants, no matter how many there might be of them or how much greater their interests, whether the common property would be benefited or injured by the location of a dram-shop in the block. It seems to us a narrow and unreasonable view that one of the co-tenants should be allowed to control all other of the owners. That each one should be regarded as a qualified petitioner for the proportionate part owned by him is the more just and the more reasonable conclusion."

In the above case the owners were tenants in common, while in the present case the owners are joint tenants.

There is an essential difference between these two tenancies.

“A joint tenancy and a tenancy in common are alike to the extent that in both cases the co-tenants hold by unity of possession. The essential difference between the two relationships is that joint tenants hold the property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights. 33 Corpus Juris, 901.”

In the case of *Eagle Brewing Company v. Netzle*, 159 Ill. App. 375, which is a case involving a lease signed by one joint tenant, the court said:

“Moreover, we are of the opinion that as against everyone except only his co-tenant, either one of two joint tenants could grant a lease of the entire premises and thereby enable his lessee to recover possession of the entire premises and not merely of an undivided half.”

While the question as to whether one joint tenant may give frontage consent proportionate to his interest in the property has never been decided in this state, there is no difference in principle between the right of a joint tenant or a tenant in common to so give consent.

We are, therefore, of the opinion that granting that Mary Flamm's name appearing upon said consent is a forgery; that William Flamm's consent would constitute a consent for one-half of said property or 12.5 feet of frontage. This would therefore leave a surplus of 6.56 feet over the necessary frontage.

We understand that the permit has been issued in this case. Therefore it is not necessary that your department take any further action.

(No. 6005—April 22, 1927—L. H.)

1 CHICAGO PUBLIC LIBRARY SITE, TITLE AND STATUS.

The title to the land upon which the Chicago Public Library stands is in the City of Chicago subject to an interest of the Home in Chicago for Soldiers and Sailors of the Civil War, and the title is not of a nature that can be disposed of by the Board of Directors of the Chicago Public Library.

2 CHICAGO PUBLIC LIBRARY, MEMORIAL HALL.

The building constructed by the City of Chicago on the Public Library site must, under existing legislation, include a memorial hall for soldiers and sailors of the Civil War for a period of fifty years at a nominal rental.

3 WORDS AND PHRASES.

"Dearborn Park" was known as the Fort Dearborn Military Reservation consisting of fifty-seven acres extending from the Chicago River to Madison street and from State street to Lake Michigan.

Mr. Harry G. Wilson, Secretary, The Chicago Public Library:

Under date of March 23, 1927, you submitted to this department three questions which you stated you had been instructed by the Board of Directors of The Chicago Public Library to request an opinion on. These questions relate to the site of the Public Library Building bounded by Washington street, Michigan avenue, Randolph street and Garland court, and are as follows:

"Has the Board of Directors of the Chicago Public Library the legal right and power to dispose of the present site of the main library building?

Has this Board the right to convey title to said site either in whole or in part to private grantees for commercial purposes?

Has this Board the right to lease any part of the building situated on Dearborn Park for commercial purposes?"

The answer to all these questions depends on the nature of the title and the limitations on the use, occupancy and disposition of the land, so that in the last analysis there is really only one question.

The library building stands on a plot of ground which was formerly known as "Dearborn Park," a part of a tract located in the southwest quarter of fractional Section 10 and originally consisting of about 57 acres extending from the Chicago River on the north to Madison street on the south and from State street to Lake Michigan. This was known as the Fort Dearborn Military Reservation.

The Federal Government first laid out a subdivision known as Fort Dearborn Addition to Chicago, and the property in question was marked "Public ground forever to remain vacant of buildings." What the legal effect of this was and whether the title passed by the document which was recorded we are not called upon to discuss, since the rights we are determining may be based on the famous Lake Front decision, wherein it was held that the title had passed from the United States and was in the City of Chicago as the public agency of the State of Illinois for the purposes for which the dedication of the land was made. *State of Illinois v. Ill. Cent. R. R. Co.*, 33 Fed. 730; *Ill. Cent. R. R. v. State of Illinois*, 146 U. S. 387.

The decision of the U. S. Circuit Court in the Lake Front case was rendered in 1888 by Judges Harlan and Blodgett. Prior to that time, on the theory that the title was in the Federal government, numerous attempts were made to secure legislation from Congress which would permit the erection of a building on the property. The plan at one time was to erect a building to serve the three-fold purpose of a Public Library, a Soldiers' Memorial Hall and an Academy of Design; at another time to erect three separate buildings; and at still another time to erect two separate

buildings. Since we are assuming that the Lake Front decision is the basis for the present and future status we will not go farther into matters that preceded it.

The Legislature of the State of Illinois took a hand in disposing of the property in question immediately after Judge Harlan's decision. It passed an act on June 4, 1889, authorizing the use of the north quarter of the ground for a Soldiers' Memorial Hall. (Cahill's Stat. 1925, p. 276.) It would seem that an agreement had already been reached in some way to have the ground occupied jointly by the Chicago Public Library and the Soldiers' Memorial Hall, because the law thus passed provided for the storing of war memorials, charts and other things belonging to the library in the memorial hall, for the transfer of title to the library at the end of fifty years, etc. There is a proviso at the end of the Act, which reads as follows:

"Provided, however, that said building shall never be deprived of its distinctive character as a Soldiers' Memorial Hall, or be used by the directors of the Chicago Public Library or any other person to the exclusion of any of the non-political organizations of the soldiers and sailors of the late civil war."

Following the passage of this act, efforts were made on behalf of the soldiers to secure the consent of abutting property owners to the erection of a building, it being generally conceded that these owners had rights which must be considered. Incidentally, it may be said here that if such rights existed then they may still exist. Some of these owners objected to any occupation of the north quarter of the plot except for library purposes. The proposition was then thrust forward that the library should occupy the whole tract and make provision for a hall in its building. Thereupon the City Council on May 19, 1890, passed an ordinance authorizing the Board of Directors of

the Chicago Public Library to take possession of the piece of ground known as Dearborn Park (the plot in question) for the purposes of a Public Library Building. The ordinance contained a proviso to the effect that in erecting such building the Board of Directors should make provision for a memorial hall and for the use of such organizations of soldiers and sailors as desired to use such hall at a nominal rental for a period of fifty years "and no longer." It was further assumed that the legal right to occupy the land must be obtained from the Legislature. There was, therefore, an act passed by the General Assembly on June 2, 1891. (Cahill's Stat. 1925, p. 1524.) The title of this Act is "An Act to authorize the Chicago Public Library to erect and maintain a public library on Dearborn Park, in the City of Chicago, and to authorize the Soldiers' Home in Chicago to sell and dispose of its interest in the north quarter of the said park." By this Act the Chicago Public Library is authorized to take possession of the ground, to erect and maintain thereon a public library building, etc., with the proviso "that no building shall be erected upon the north quarter of said ground by the Chicago Public Library until it has obtained, by purchase or otherwise, whatever interest the Soldiers' Home in Chicago acquired in the same," etc. The Act further provides that in case the library obtains this interest it shall construct therein a hall to be known and forever maintained as a memorial hall to commemorate the patriotism and sacrifices of the Union soldiers and sailors of the late Civil War. The Act further provides that such hall when completed may be leased by the Chicago Public Library at a nominal rental for a period of fifty years to the Grand Army Hall and Memorial Association of Illinois.

By the passage of the two Acts above mentioned and the ordinance of the City of Chicago it would seem that all

obstacles to the erection of a building to be used jointly as indicated were overcome, at least no question has at any time been raised.

If the proposition to use the building in a different way than as provided for by the Acts and Ordinance of which we speak is to be given serious consideration, it would be necessary to go back of the authority conveyed by these enactments. In other words so long as the title of the Public Library and its right to erect a building is based on the Acts and the Ordinance referred to the occupation must be treated as an entirety. The Public Library Board cannot ignore the rights of the soldiers and sailors and it cannot ignore the rights of abutting property owners who have given their consents to the erection of the kind of building that is there at present. If it did this, it would strike a blow at its own title.

While it is true that the title to the property would still remain in the City as was decided in the Lake Front decision it is doubtful whether it could be used for public library purposes without further enactment on the part of the General Assembly, and it is doubtful whether it would not be necessary to go over the whole procedure as was done originally. Even that is impossible unless some flaw in the respective rights of the soldiers and sailors and the property owners is discovered as indicated.

We are, therefore, of the opinion that no change in the occupation of the property can be made at least until the fifty years provided for in the Act of 1891 and the ordinance of the City of Chicago has expired. We do not believe that the Board of Directors of the Chicago Public Library can dispose of the site under any circumstances, since that is the property of the City of Chicago. This answers your first question and it also answers the second question in which you ask whether the Board has the

right to convey title to private grantees for commercial purposes.

With respect to your third question, as to whether the Board has the right to lease any part of the building for commercial purposes we are of the opinion that such use of the property cannot be made unless there is secured the consent of the property owners who were originally consulted, and whose rights seem to have been conceded at that time, or some other method can be found for overcoming the dedicatory provision to the effect that such ground must be left free from buildings. Whatever could be done along this line at the end of the fifty year period, if anything, cannot be done at the present time. While there are intricate propositions involved that might ultimately lead to different conclusions than those that have been accepted for practically forty years based on the Lake Front decision and its meaning as interpreted by the Legislature and the City Council, we are convinced that at the present time no such use as suggested by your three questions can be made of the site.

We return herewith the abstract of title and two continuations, the letter of A. F. Hatch attached to opinion of D. L. Shorey, copy of G. A. R. lease and extension, and pamphlets prepared by Kirk Hawes and A. T. Hatch, which you submitted to us for the purposes of this opinion.

(No. 6006—April 25, 1927—F. J. V.)

CITY COUNCIL, POWER, FIRE DEPARTMENT.

Upon the motorization of the Fire Department, the City Council alone has power to make eligible to the new positions fire engineers and assistant fire engineers who hold positions as such under the old steam pumping system.

Hon. A. W. Goodrich, Fire Commissioner:

We have your communication of April 22nd referring to a condition in the Fire Department affecting certain fire engineers and assistant fire engineers and requesting an "opinion as to the proper procedure in the matter."

The facts will be best presented by incorporating here your own statement which is as follows:

"I am informed that there are about twelve (12) fire engineers and assistant fire engineers on the payroll of this department who do not perform the duties of their respective positions. Four (4) of these men neither drive the automobile pumping engines to the fire nor operate them upon arriving at the fire. The balance of these men operate the motor pumping engines but do not drive the same.

"This situation is a result of the motorization of the department and these men originally entered the department and were assigned as fire engineers and assistant fire engineers on the old steam pumping engines. With the advent of the motor pumping engine in the department, these men being unable to handle the automobile, were kept on the payroll, and, in some instances, were performing the duties of firemen."

It is this situation in the fire department that gave rise to the recent case of *People ex rel. Watters v. Civil Service Commission and the Fire Commissioner*.

These positions were created by the appropriation ordinance of the City Council. By the mandate of the Appellate Court, the defendants were compelled to hold an

examination to create an eligible list and to certify therefrom for appointment and to appoint to all vacancies existing in these positions those so certified. The court, speaking of this matter, said:

“If, then, these positions have been created by the Act of the City Council and there are vacancies therein, neither the Fire Commissioner nor the Civil Service Commissioners have power to decide whether or not it is necessary to fill these positions. They cannot abolish a position which the City Council has created by refusing to take the proper steps required by law to fill any vacancies. (Citing cases.)”

You state that you would like this condition remedied at the earliest possible date and therefore ask our opinion as to the proper procedure.

This situation is not within the power of the Fire Commissioner or the Civil Service Commissioners to remedy. The City Council alone, as the legislative branch of the city government, is empowered to correct or remedy the situation here referred to. All that can be done by the Fire Commissioner himself is to communicate officially with the City Council in a report and make such recommendation as may be deemed advisable.

For your information, we may state that several conferences were held by the Fire Commissioner, the Civil Service Commission and representatives of the Union of Engineers. It seems that the former Fire Commissioner sought to have these positions now defined as engineers and assistant engineers abolished or modified so as to make the firemen eligible to promotion to the new position. This proposal was opposed by the engineers who alone are now eligible to these positions.

We are informed that the matter was submitted to the Council for action. We believe, however, that no action

was taken. The Fire Commissioner refused to make any further appointments to these positions and the Civil Service Commission would conduct no examination to create eligibles for appointment, and therefore the Watters mandamus case followed, which resulted in the writs being issued against the Commission and the Fire Commissioner as above stated.

Since the City Council alone has power to abolish positions or to make any changes therein, even upon such a state of facts as now exist in the fire department, all that can be done by the Fire Commissioner in the matter is to make official recommendation to the proper council committee for such action as to him may be deemed necessary and proper.

(No. 6007—April 25, 1927—G. F. M.)

POLICE BENEFIT, INSANE POLICEMEN.

The widow of an insane policeman is entitled to an annuity under section 32(d) of the Police Benefit Fund where her husband was under fifty-seven years of age and insane when he died, he never having resigned nor been discharged from the service.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to the pension rights of a widow of a policeman who died while he was insane, the following is submitted:

Your letter states that on May 1, 1924, Frank P. Keating, Police Operator, was placed on the ordinary disability benefit roll; that at that time he had to his credit a net service of 6 years and 7 months; that his allowable period of disability benefit expired December 31, 1925; that he

was adjudged insane and that on August 7, 1923, his wife was appointed conservatrix; that he was committed to the Chicago State Hospital and paroled from that institution on several occasions; that he died there on March 28, 1927; that no resignation was ever filed on behalf of said Frank P. Keating and that the said Frank P. Keating was never discharged from the Department and was therefore a member of the Department at the time of his death. I am also informed that the records of your office show that Mr. Keating was born October 20, 1888, and was therefore less than 39 years of age at the time of his death.

Paragraph (d) of Section 32 of the Policemen's Annuity & Benefit Fund Act provides as follows:

"(d) The widow of any present employee who shall die while in the service before he shall have become 57 years of age shall have the right to receive annuity, from and after the date of the death of such present employee, of such amount as can be provided from the total amount of the several sums to the credit of such present employee on the date of his death for age and service annuity, widow's annuity, prior service annuity and widow's prior annuity service purposes," etc.

Section 48½ of the Policemen's Annuity & Benefit Fund Act provides that in any case in which the sum to the credit of a policeman for the purpose of providing annuity for his widow shall be insufficient to provide a life annuity payable at the rate of \$10.00 per month for such widow, a term annuity shall be fixed for her.

I am of the opinion that the widow of Frank P. Keating is entitled to receive and be paid an annuity to be fixed in accordance with the provisions of section 32(d) and section 48½ of the Policemen's Annuity & Benefit Fund Act.

(No. 6008—April 25, 1927—G. F. M.)

POLICE BENEFIT, ANNUITY, DETERMINATION.

The amount of annuity of a policeman whose ordinary disability benefit period has expired before he has attained age 50 and while he is still disabled is determined by his age at the time of his resignation or discharge from the service.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to the pension rights of William M. Gleason, the following is submitted:

Your letter states that on September 13, 1923, William M. Gleason, who then held the rank of Dog Catcher, was placed on the ordinary disability benefit roll of this fund following the report of the Board physician that he was suffering from pulmonary tuberculosis; that he was carried on the disability benefit roll until October 6, 1926, at which time his allowable period of disability benefit expired; that his total service, including time on disability, is 15 years 3 months and 27 days; that you have informed Mr. Gleason that he would probably be entitled to life annuity of \$25.00 a month on the basis of his age at the time his allowable disability benefit period expired. I am also informed that the records of your office show that Mr. Gleason was born on March 25, 1881; that he joined the Department on June 9, 1911, and that his last salary was at the rate of \$2,000.00 per year.

Section 48 of the Policemen's Annuity and Benefit Fund Act provides as follows:

“Notwithstanding any other provisions of this Act, whenever any policeman who shall have served less than twenty years, and who shall have received ordinary disability benefit under the provisions of this Act shall be disabled, as the result of any cause other than injury incurred in the performance of an act or

acts of duty, after a period or periods of time aggregating in excess of one-fourth of the entire term of such service rendered by such policeman, * * * and such policeman shall resign or be discharged from the service while still so disabled and before he shall have attained an age of fifty years, such policeman shall have the right to receive annuity from and after the date of such resignation or discharge from the service, of such amount as can be provided from the sum to the credit of such policeman on the date of such resignation or discharge for the purpose of providing annuity for such policeman. Any such annuity shall be computed as of the age of the policeman concerned *on the date of his resignation or discharge from the service.*"

I am of the opinion that Mr. Gleason is entitled to have his annuity figured as of his age on the date of his resignation or discharge from the service and not as of his age at the time his allowable period of disability benefit expired. If Mr. Gleason does not resign or is not discharged until June 9, 1927, he will then be 46 years of age and will be entitled to have his annuity computed as of the age of 46 years.

(No. 6009—April 25, 1927—L. H.)

1. CITY COUNCIL, POWER, ASSESSMENT OF PROPERTY, APPROPRIATION.

The City Council has power to make an appropriation for the purpose of taking steps to prevent improper assessments.

2. BOARD OF REVIEW, JURISDICTION.

Although the assessment of real property is quadrennial, action toward looking for a better assessment may be taken at any time.

Hon. John S. Clark, Chairman, Committee on Finance:

In reply to your letter of the 22nd instant in which you ask us to give you an opinion as to the legality of the

expenditure of moneys from an appropriation of \$85,000 for the work of proper appraisal with a view of equalizing valuation for taxation purposes we submit the following:

The primary purpose of the appropriation in question is to secure for the City of Chicago the revenue to which it is justly entitled under the law, and we assume that the point has been raised that by using money of the City for purposes of appraisal before or at the time the Board of Assessors is making its survey for the same purpose there would result an overlapping of functions not contemplated by law. This idea is very likely predicated on the theory that we have no right to assume at this time that there will be anything else but a proper assessment made by the Board of Assessors. In other words we take the position that the propriety of asserting the City's rights after an assessment has been made that is looked upon as improper or inadequate cannot be seriously assailed. Therefore, the only question is what limitation there is on the power of the City to take steps to secure a proper assessment at the beginning of the work of making a survey for such purpose.

The City Council's authority with respect to the finances and property of the corporation and the appropriation of money for corporate purposes is very sweeping. In addition to that, by the third clause of Section 1 of Article V of the Cities and Villages Act it is given power "to levy and collect taxes for general and special purposes on real and personal property."

The power of the Board of Assessors under which it proceeds to view property and make the quadrennial assessment of real estate is contained in Section 12 of the Revenue Act of 1898. There is nothing in that section which in any way prevents the City Council from taking such steps as will assist such board to make a proper

assessment. If an improper assessment is made, the City Council would have authority to act, even so far as to institute suit to compel the Board of Assessors to make a proper assessment (38 Corpus Juris, p. 836). Such being the case, it must follow that the City Council can take such preliminary steps as it deems necessary to prevent the making of an improper assessment.

While it is true that no one has the right at the present time to assume that the Board of Assessors will make a quadrennial assessment that is not correct, nevertheless the experience of the past has demonstrated that the law is not strictly followed in the making of assessments by the boards which are charged with that duty. Some of the members of the Board of Assessors and Board of Review have even taken it upon themselves to state that they are standing between the taxpayer and public officials who are seeking to impose excessive taxes. The law does not impose such an obligation on these officers. It is in fact very exact in its requirements, and states that they should value property at its actual value for purposes of taxation. Moreover, it is a fact that the City Council has been compelled to take notice repeatedly that real estate valuations for purposes of taxation and valuations of other property have been lower than the law contemplates. Therefore, it is clearly within the discretion of the City Council to make such moves as it deems proper at the outset to avoid the possibility of a lower assessment again being made.

There are certain passages of the Revenue Act of 1898 which indicate that the taxing authorities interested may proceed in such manner as they deem proper to procure an assessment according to law. Thus, in section 35, relating to the power of the Board of Review to tax property omitted from assessment during previous years, appears the following:

“For the purpose of enforcing the provisions of this Act, the several taxing bodies interested therein are hereby empowered to employ counsel to appear before said Board and take all necessary steps to enforce the assessment on such omitted property.”

Again, in section 25 it is stated that “the office of the Board of Assessors, County Supervisor of Assessments and the County Assessor shall be open all the year during business hours to hear or receive complaints or suggestions that real property has not been assessed at proper valuation.” There are other provisions of the statute which might be quoted in this connection indicating that action may be taken at any time of the year looking towards a better assessment. Inasmuch as the statute expressly says that suggestions may be made to the Board of Assessors at any time that real property has not been assessed at its proper valuation, any attempt to limit this power in such a way that it cannot include a suggestion as to the future would be drawing an exceedingly fine line.

The possibility of premature action on the part of the City is not controlling, so far as its power is concerned. This was practically decided in the case of *State Board of Equalization v. Goggin*, 191 Ill. 528, where it was contended that no writ of mandamus should be asked for until the Board has concluded its labors. The Supreme Court held that it was proper to apply for such writ on the facts presented which showed that the Board had done nothing in the furtherance of a request made, even though it still had time to act.

We are informed the appropriation made in the present instance contemplates such an investigation as will enable the City to render substantial assistance to the Board of Assessors in its work, and at the same time, if the plan to give the Board of Assessors information on which it can

act is successfully carried out, the City will be relieved of the expense of an investigation later on and the cost of attorneys and litigation to enforce its rights. Thus it will merely pay at this time money for purposes which can be more effectually accomplished now than later, and since there can be no question about its right to use money at a later time to enforce its demands, it is clearly within its rights at the present time in taking preliminary steps and resorting to measures in advance which will accomplish the results that it is lawfully authorized to bring about.

(No. 6010—May 6, 1927—L. H.)

CHEMICAL OR PAINT FACTORIES, LICENSE FEE.

In fixing a license fee under Class I, section 2482 of the Municipal Code, the computation is based upon the one who actually makes the substance, excluding an employee like an errand boy, members of the family, and salesmen; in determining the fee under Class 2 the computation is based upon employees such as shipping clerks, truck drivers and others attending to the bottling, labeling, canning and packing, although they are indirectly connected with the actual preparation of the manufactured product, disregarding the office employees and salesmen and starting with a fee of \$20.00 and adding \$1.00 for each employee.

Hon. Morris Eller, City Collector:

Your letter of recent date in which you inquire concerning the proper computation to be made to ascertain license fees for chemical or paint factory licenses, was referred to the writer for consideration and reply.

You state that in fixing the basis for such fees in section 2482 of The Chicago Municipal Code of 1922 there is a distinction made between Class I and Class II. You attach to your letter copy of a letter from Christ A. Zoes, 166 N. Sangamon street, in which he asks to be informed what fee he will be required to pay. You pass this ques-

tion on to us and you further ask whether certain classes of employees should be included when computing fees to be paid for licenses under Class II.

The section of the Code to be interpreted reads as follows:

“For the purpose of this article chemical or paint factories are classified, and the annual license fee for each class shall be as follows:

“Class I. Employing not more than one person in the manufacture or preparation of chemicals, paints and oils. The license fee for this class shall be five dollars.

“Class II. Employing more than one and not over ten persons. The license fee for this class shall be twenty dollars and one dollar in addition for each person employed in such establishment. The number of employes shall be computed on the average daily number of persons employed during the preceding calendar year, exclusive of office employees.” (Sec. 2482, Municipal Code of 1922.)

It was manifestly the intention of the City Council to make a distinction between the kinds of employees to be counted in the two classes. In Class I there is a small license fee imposed in the case of a licensee who either makes the chemicals or paints himself or has one person employed who makes them. Evidently it was the intention of the City Council to avoid the possibility of some employee like an errand boy, or a member of the family, or a salesman, from causing any increase in the license fee. Therefore, the basis of computation was fixed so as to include only the one who actually makes the substance.

In the case of establishments of Class II the situation is different. There the license fee partakes more of the nature of a revenue license, and it is graded on the basis of the size of the establishment. It includes in the computation such employees as shipping clerks, drivers of

trucks, and employees engaged in the bottling, labeling, canning, packing and other manual labor, even though they are only indirectly connected with the actual preparation of the product manufactured.

To ascertain the license fee due from Mr. Zoes it will be necessary to start with a \$20.00 fee and to add to that a dollar for each of the following: The owner and the two assistants who make and prepare the shoe dressings, the two shipping clerks and the eight or ten piece workers engaged in bottling, labeling and packing. The persons employed in the office and the salesmen are not to be included in this computation.

(No. 6011—May 9, 1927—J. I. McC.)

1 LICENSE, STEAMSHIP TICKET BROKER.

Steamship brokers must secure a City license.

2 WORDS AND PHRASES, GENERAL BROKER, STEAMSHIP TICKET BROKER.

Persons who book for steamship passage based upon a percentage of the sale price of steamship accommodations are brokers within the meaning of section 374 of the Municipal Code of 1922.

Mr. George Seebacher, Superintendent, Department of License:

In your letter for an opinion you asked, "whether or not the assumption by your Department is correct that

firms handling steamship tickets on a brokerage basis should procure a license."

Ettelson's Chicago Municipal Code of 1922, Chapter XVI, Section 374, defines a broker. This article was amended in April, 1923, Council Proceedings, pp. 2367-2369, and the amendment gives the definition as follows:

"Any person, co-partnership, association, firm or corporation, other than an employee of the principal or principals for whom the business is done, that negotiates, buys, sells, trades, leases or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks, bonds, mortgages, loans, investment securities, certificates of indebtedness, foreign exchange, letters of credit, *steamship transportation tickets* * * *, shall be and is hereby defined as a general broker."

The penalty clause under the amendment of April 5th, 1923, is Section 380.

It is our opinion that the people that are booking steamship passage for their various customers, receiving therefor from the steamship companies a per cent of the sale price of the steamship accommodations, are brokers and come within the above definition. We hold, therefore, that your assumption that these firms should procure a broker's license is correct.

(No. 6012—May 10, 1927—J. G. D. et al.)

1 VERIFICATION, INSUFFICIENT, ELECTION CONTESTS.

In verifying the statement or petition for the contest of an aldermanic election it is not enough to state that the petition is true to the best of one's knowledge and belief without stating what the knowledge and belief is or what the matters alleged therein are within affiant's knowledge and belief. The verification must be such as would sustain a prosecution for perjury if the facts verified are not true.

2 PETITION, ELECTION CONTESTS.

An averment that one of the only two candidates for alderman did not receive a majority of the votes cast is a mere conclusion where the total votes cast for the various candidates is not stated and the records show that the conclusion is wrong.

3 PETITION, FRAUD, ELECTION CONTESTS.

General allegations of fraud are insufficient in a petition to contest an election on the ground of fraud, but specific instances of fraud should be alleged, giving names, by whom and the precincts wherein the fraud was committed.

To the Honorable, the Judiciary Committee of the City Council of the City of Chicago:

I have, at the request of your Honorable Body, examined the said petition of Charles Scribner Eaton and am of the opinion that the same is not sufficient to warrant action by the City Council in the premises, and that the same should be dismissed.

The petition or statement is not verified as required by the City Ordinance.

Section 1132 (chapter XXVII) of the Chicago Municipal Code of 1922 provides:

“When any elector * * * shall desire to contest the election of a person declared elected to the office of alderman * * * he shall, within thirty days after the person whose election is contested has been declared elected by the Election Commissioners, file with the City Clerk a statement in writing setting forth the

grounds on which he will contest the election, *which statement shall be verified by affidavit.*"

The verification to said statement or petition is as follows:

"Charles Scribner Eaton, being first duly sworn, on his oath deposes and says that he has read the foregoing statement and has subscribed his name thereto, and that the same is true *to the best of his knowledge and belief* * * *."

This does not amount to a verification or to a statement on oath of the truth of the matters alleged in the statement. It is a mere statement under oath that said petition is true "to the best of his knowledge and belief," but what the knowledge and belief of the affiant may be does not appear, nor does it appear that the affiant has any knowledge or any belief as to the matters alleged in the petition.

In *Knol v. Knol*, 171 Ill. App. 412, it was held that the following verification was insufficient:

"that all the allegations set forth in the bill of complaint * * * are true in substance and in fact except as to such matters which are stated upon information and belief, and as to such matters she believes them to be true."

The court said (page 413):

"This language has been many times held to constitute an improper verification because it is impossible to say which matters are stated in the bill on information and belief, and which matters are within the personal knowledge of the complainant."

In *Neil v. Oldach*, 86 Ill. App. 354, at page 356, the Appellate Court said:

"But the affidavit is insufficient * * * in that it leaves it indefinite as to which allegations of the bill are positively verified and which are stated to be true

upon information and belief only. The form of the averments in this affidavit has been before this court several times, and has in each instance been pronounced insufficient. The affidavit is in part as follows: That affiant has heard the above and foregoing bill subscribed by him, etc., and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true * * *.

"This is not sufficient. *Siegmund v. Asher*, 37 Ill. App. 122; *Bradbrook T. Co. v. Belding*, 40 Ill. App. 326; *Heffron v. Rice*, *id.* 244; *Stirlen v. Neustadt*, 50 Ill. App. 378; *Werner Co. v. First Nat. Bank*, 55 Ill. App. 321; *North Elec. Ry. Co. v. C. M. & St. P. Ry. Co.*, 57 Ill. App. 409; *Commerce Vault Co. v. Hurd*, 73 Ill. App. 107."

According to the above and other decisions, the alleged verification is no verification at all, since it is a mere statement that the allegations in the petition are true "to the best of his knowledge and belief" and what the knowledge and belief of the affiant is cannot be determined.

The petition is therefore unverified and does not meet the requirements of the ordinance.

The section of the ordinance above quoted provides further

"No objection to such statement on account of informality or insufficiency will lie, but such contest may be dismissed by the City Council * * * if the statement is not filed within the time fixed herein, *or is not verified by affidavit.*"

A consideration of the allegations of the petition may explain the lack of a verification of the same.

The petition proceeds upon two theories:

First: That Grossman did not receive a majority of the votes cast for alderman of the Fifth Ward at the election

of February 22nd, 1927, and that therefore a supplemental election should have been called on April 5th, 1927, which was not done, although Eaton demanded of the Election Commissioners to provide and furnish ballots for such purpose.

Second: That there were frauds and irregularities committed at said election of February 22nd, 1927.

As to the first statement, the allegations are wholly insufficient to warrant attention. Said petition avers that at the election of February 22, 1927, the said Eaton and Grossman were the only candidates for alderman of said Fifth Ward and that at said election in said ward, the said Grossman did not receive a majority of the votes cast for alderman of said ward.

The petition does not aver how many votes were cast for alderman in said ward, nor does it state the total number of votes cast for Eaton and Grossman respectively, so that the averment aforesaid, that Grossman did not receive a majority of the votes cast for alderman is a mere conclusion without any allegation of fact whatever to support the same.

The facts with regard to the total vote cast for Eaton and Grossman respectively at said election are matters of record in the County Court and do not support, but are contrary to, the conclusion averred in said petition.

The facts as shown by the records of the Election Commissioners are that at said election in the Fifth Ward on February 22, 1927, a total of 15,359 voters in said Fifth Ward cast ballots at said election and that a total of 14,902 votes were cast for alderman, of which the said Leonard J. Grossman received 7,502 votes and the said Charles Scribner Eaton received 7,400 votes. The fact of record therefore is (contrary to the conclusion of the petition) that the said Leonard J. Grossman received a majority of

the votes cast for alderman and was and is therefore the duly elected alderman of the Fifth Ward.

Section 6 of the Election Act provides:

“The candidate receiving a majority of the votes cast for alderman in each ward, at any general or special election, shall be declared elected.”

As appears of record, the difference between the total number of voters casting ballots at said election and the number of votes cast for alderman is 457. The total votes cast at the election and the total votes cast for alderman are not synonymous. As said in *People v. Hedlund*, 309 Ill. 280-283:

“A majority of the votes cast at an election is not synonymous with the majority of the inhabitants voting on the proposition. The number of votes cast at an election is determined by the poll-books, while a majority of the votes cast on a given proposition is determined by the ballots. (*Chestnutwood v. Hood*, 68 Ill. 132.) The Supreme Court of New Jersey, in construing the phrase, ‘a majority of the electors qualified to vote for members of the legislature voting thereon,’ (this being a requirement for the adoption of an amendment to their constitution), held: ‘By the words electors voting thereon’ are intended the electors who exercise the right of suffrage in such manner that their votes should, under the law, be counted for or against the proposition submitted, and although the number of names on the poll-lists may represent the number of qualified electors who attempted to vote and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted in the constitutional sense, and that the rejected ballots were not votes. * * * The presumption is that the election officers acted rightly, and that therefore the rejected ballots were rejected for legal cause and were not votes for or against any amendment; that all the votes legally capable of being counted for or against the amendment were qualified ‘electors voting thereon,’ of whom a majority approved and ratified it.” *State*

of New Jersey v. Wurts, 63 N. J. L. 289, 45 L. R. A. 251.

It is further alleged in said petition, "that no official declaration was or has been made by any official body that said Leonard J. Grossman did on February 22, 1927, in said election, receive a majority of the votes cast for alderman of said Fifth Ward; that no official declaration was or has been made that the said Leonard J. Grossman was elected to the office of alderman of said Fifth Ward."

This allegation is contrary to the facts of record. On April 6, 1927, there was filed in the office of the City Clerk, a duly certified copy (by Robert M. Sweitzer, County Clerk) of an abstract of the votes cast for alderman of the Fifth Ward at said election February 22, 1927, from which record it appears that said Charles Scribner Eaton received 7,400 votes for alderman of the Fifth Ward and Leonard J. Grossman received 7,502 votes for alderman of the Fifth Ward.

As it appears of record and it is alleged in the petition that said Eaton and Grossman were the only candidates for alderman in said election in said Fifth Ward, it is evident that the total vote cast for alderman in said ward was 14,902 votes, of which the said Grossman received a majority. *People v. Hedlund, supra*.

The facts are therefore (contrary to the averments in said petition), first—that at said election, said Grossman received a majority of the votes cast for alderman in said ward, and second—that an official declaration was made by the proper authorities that at said election the said Grossman received a majority of the votes cast for alderman.

The balance of said petition is made up of general allegations of fraud and deception practiced by the judges

and clerks of election, but there are no specific instances of fraud alleged. No particular judge or clerk is named in said petition, nor is any particular precinct, in which it is alleged fraud was committed, identified by number or otherwise.

The petition so far as the allegation of fraud is concerned is a mere sweeping declaration that fraud was committed in and by every manner and means which it could possibly be conceived fraud might have been committed. There is no single allegation of fact to support the sweeping charge.

The sweeping charge of fraud becomes much less entitled to consideration in view of the other unfounded charges in the petition that Leonard J. Grossman did not receive a majority of the votes cast for alderman at said election which is found to be contrary to the facts of record which are open to and must have been known to the petitioner when he prepared the statement to the contrary.

The allegations of the petition, which are contrary to the facts of record, demonstrate the reason for, and importance of the requirement of the ordinance that the statement for contest be verified; and also indicate that the failure to properly verify may not be due to inadvertence. The true test as to the verification is, "Could perjury be assigned if the allegations of the Statement are untrue?" No perjury could be assigned on the verification in question, because it is not stated, unqualifiedly, that the allegations are true; but that they are true to the best knowledge and belief of the petitioner, and his knowledge and belief could not possibly be determined by any human agency.

Because the statement or petition is not verified as required by ordinance, it is my opinion that it is not the proper basis for a contest on the office in question, and should be dismissed.

(No. 6013—May 13, 1927—J. J. C.)

STREETS AND ALLEYS, CITY COUNCIL, POWER.

Through streets or boulevards are designated and established by virtue of the power given by section 33 of the Motor Vehicle Act.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter of recent date, requesting this office for an opinion as to the rights of vehicles on through streets, and also whether the City can "give preference to one through street over another," is received.

The City has plenary power to regulate the use of streets and traffic thereon, and may establish such rules as in the judgment of the City Council are necessary and appropriate, providing, of course, that they are not unreasonable or arbitrary, and do not conflict with any of the provisions of the Motor Vehicle Act, the Illinois Commerce Act, or any other special legislation that may touch on the question of traffic regulation. Section 33 of the Motor Vehicle Act authorizes the City to designate certain streets or boulevards as preferential traffic streets and to prescribe rules regulating traffic upon or over such streets or boulevards. It is by virtue of this authority that through streets have been established. This section also provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left. Vehicles on through streets have no greater rights than vehicles on any other streets. The only advantage of a through street is that the requirement of a full stop upon approach to such through street tends to permit a greater freedom of traffic on such through street and establishes a right of way as to the vehicles approaching each other from right angles. No

attempt has been made in any City ordinances to prescribe the duration of the full stop at a through street, the ordinance only requiring that a full stop should be made.

We do not understand what you have in mind in inquiring whether the City can give preference to one through street over another. Where through streets intersect it has been the rule that a full stop must be made by vehicles on both streets at the intersection. This rule has become especially established by the installation of the "Stop" and "Go" signals at practically all intersections. The provision of the Motor Vehicle Act to the effect that vehicles approaching intersecting highways from the right shall have the right of way over those approaching from the left, is of general application and applies to intersecting through streets as much so as to intersections of other streets, but where a through street intersects with a street not a through street, vehicles on the through street, whether approaching from the right or the left, have the right of way to the extent that the vehicles approaching from the intersecting street must come to a full stop at the through street. When the full stop is made at such an intersection, the question of right of way from then on is determined by the application of the other rule, viz., that the vehicle approaching from the right shall have the right of way over the vehicle approaching from the left. *Lenartz v. Funk*, 224 Ill. App. 180; *Part-ridge v. Eberstein*, 225 Ill. App. 209.

With reference to the abolishment of stops on Ogden avenue at its intersection with Homan avenue and Hamlin avenue, both of which are also through streets, the abolishment of such stops would necessarily be out of harmony with the obvious purpose of the City Council in designating Homan avenue and Hamlin avenue as through streets, and would result in confusion. Being through streets, drivers

of vehicles on either of them would have a right to assume that vehicles on intersecting streets would come to a full stop upon approach and would undoubtedly proceed upon that assumption, and if such stops were not made it is probable that many unnecessary accidents might result. The effect of abolishing these stops would be to make Homan avenue and Hamlin avenue through streets except for their intersection with Ogden avenue. In our judgment this would be so confused and involved as to result in more harm than good. Uniformity in traffic regulation is highly desirable and we think it would be unwise to sacrifice it for whatever slight convenience might be afforded to vehicles on Ogden avenue.

(No. 6014—May 13, 1927—C. W. K.)

FIRE COMMISSIONER, POWER, REFRIGERATION SYSTEM.

Whether methyl chloride used in a refrigeration system in theaters would constitute a special fire hazard may be determined by the Fire Marshal under section 1276 of the Municipal Code before the installation of such a system.

Hon. Albert W. Goodrich, Fire Commissioner:

In reply to your communication of April 23, 1927, in regard to the Mid-West Theater located at 3630-40 Archer avenue, in which you state that this theater is installing a new type of refrigeration; that the refrigerant used is methyl chloride and that methyl chloride is a flammable and explosive gas and does not make its presence noticeable to such an extent that the building would need to be vacated by the occupants and that because of the location of the refrigerating unit, it would be an easy matter for this flammable gas to travel into the ventilating ducts and then be discharged into the audience room of the theater,

and that it is the opinion of the chiefs of your department that the use of methyl chloride and similar flammable and toxic gases constitute a special hazard in theaters and request an opinion relative to your powers should this refrigerating system be installed.

There is no specific provision in the city code relative to the use of methyl chloride and whatever power you have must be found in the following sections of the city code:

“1276A. The chief of fire prevention and public safety shall make or cause to be made frequent and regular inspections, with sufficient frequency to secure efficient supervision of all buildings, structures or places used either for manufacturing or commercial purposes, or occupied or frequented by large numbers of people, of all school buildings, public halls, churches, hospitals, theaters, etc., for the purpose of determining the safety of the occupants of such building, structure or places in the event of fire, panic or accident.
* * *”

Paragraph (b) provides:

“In case it is found that any of the said provisions in this chapter are not being complied with, or that any building, structure or place, or its contents, or *any appliance or equipment thereof, is in such condition as to be the probable cause of fire or as likely to endanger life or safety in case of fire, panic or other accident*, the chief of fire prevention and public safety shall give notice in writing to the owner, occupant, lessee or person in possession, charge or control of such building, structure or place, to make such changes, alterations or repairs or to perform such work or to take such action as the provisions of this chapter or the safety of any person or persons in or about any such building, structure or place in case of fire, panic or other accident may require, within such time as shall be designated by the chief of fire prevention and public safety which shall in no event exceed fifteen days. * * *”

In regard to procedure you should be guided by section 1278 of the fire prevention code, which reads as follows:

“The chief of fire prevention and public safety shall have the power, and it shall be his duty, to enforce all the provisions of this chapter which may tend to prevent the starting and spreading of fires or disastrous results in case of fire, and to order the discontinuance of any practice which may result in the starting or spreading of fire.”

And if in your opinion the use of methyl chloride constitutes a special hazard you should serve notice on the owner, occupant or person in possession, charge or control of this theater that the use of methyl chloride would make the premises perilous to life and property as provided in section 1276, par. (b).

Section 1279 reads:

“Whenever it shall be necessary, in the opinion of the chief of fire prevention and public safety, to call upon the department of police for aid or assistance in carrying out or enforcing any of the provisions of this chapter, he shall have the authority so to do, and it shall be the duty of the superintendent of police, or of any member of the police force, when called upon by said chief or his duly authorized agent, to act according to the instructions of and to perform such duties as may be required by him, in order to enforce or put into effect the provisions of this chapter.”

Section 1532 provides:

“Any building, structure, enclosure, place or premises perilous to life or property by reason of the nature, condition or quantity of its contents or its use, or the overcrowding at any time of persons therein, or by reason of deficiencies in such fire alarm or fire prevention equipment as may be required by the provisions of this chapter is hereby declared to be a nuisance and within the meaning of the word as used in this ordinance, and the chief of fire prevention and public safety is empowered and directed to cause any such nuisance to be abated.”

The exercise of the police power for the prevention of the dangers of fire is essential to the preservation of the welfare of the public. Although its application may in practice result in hardship in certain instances, nevertheless the lives of the citizens are of paramount importance and any momentary hardship to the owner of a building is of minor importance.

The city is never justified in proceeding in an unreasonable manner under its police power. If the violation of the fire prevention ordinances constitutes merely a technical violation without creating a condition which is in fact dangerous to life or property, then the building or structure should not be arbitrarily closed. But, whenever in the opinion of the chief of fire prevention a violation of the fire prevention ordinance exists which creates a condition from which danger to life or property from fire may arise, then it is the duty of the chief of fire prevention and of the superintendent of police to stop any further use of the building by the public. This is particularly applicable where a license to operate a theater, hospital or other similar enterprise has been revoked because of a failure to comply with fire prevention ordinances.

(No. 6015—May 19, 1927—G. F. M.)

PENSIONS, DEPARTMENT RECORDS. CERTIFICATE.

The Secretary and Deputy Fire Commissioner is the custodian of the records of the Fire Department and is the one to certify to its records relative to pensions.

Board of Trustees, Firemen's Pension Fund:

Replying to your request for an opinion as to what officer of the Fire Department should certify to the department records in connection with the applications for pensions

submitted to the Pension Board for consideration, the following is submitted:

The statutory enactment creating and establishing the Firemen's Pension Fund contains no provision touching on this matter.

On May 2, 1927, a city ordinance was enacted and is set out on page 144 of the Journal of the City Council for that date. The ordinance in question, among other things, amends article IV of chapter XXIX of The Chicago Municipal Code of 1922, to read as follows:

“ARTICLE IV.

SECRETARY AND DEPUTY FIRE COMMISSIONER.

1195. It shall be the duty of the *secretary and deputy fire commissioner* to preserve and keep all books and papers belonging to said department, or which are required by law to be filed therein. He shall deliver to the city council, and to the respective departments, all written communications from the fire commissioner, and shall perform such other services as may be required by the ordinances of the city. *He shall have authority, under and subject to the order, direction and control of the fire commissioner to sign or act for the fire commissioner, and shall perform such duties as may be required of him by said fire commissioner.*

“The books of said department shall be open to the inspection of the comptroller and to the city council or any member or committee thereof at all times.”

In view of the fact that the City ordinance specifically makes the secretary and deputy fire commissioner custodian of the records of the Fire Department, I am of the opinion that all Fire Department records in connection with applications for pensions submitted to the Pension Board for consideration should be certified by the secretary and deputy fire commissioner of the Fire Department.

(No. 6016—May 19, 1927—G. F. M.)

1 BENEFIT FUND, REFUNDS, PROOF OF HEIRSHIP.

A certified table of heirship should be required and filed as a protection to the Board, although an employee dies without leaving a widow or descendants.

2 APPLICATION FOR LETTERS, EMPLOYEE WITHOUT HEIRS OR ESTATE.

The value of an estate may be put at less than \$100.00 where an employee dies without heirs or known assets.

3 ADMINISTRATION OF ASSETS, REPORT, CLOSING.

The estate of an employee who has neither descendants nor assets may be closed upon filing a report to that effect without scheduling the amount of the refund, as the latter is payable directly to the heirs if there are any.

NOTE: By arrangement made with Judge Horner, of the Probate Court, since this opinion, heirship is now established on affidavit and without the necessity of probating the estate.

Retirement Board, Municipal Employees' Annuity & Benefit Fund:

Replying to your request for an opinion governing the matter of refunds to heirs and next of kin where an employee dies without either a widow or children under age 18 that would be entitled to widow's and minor children's annuities in cases where there is an amount to be refunded in excess of \$500.00, and where there is no other estate to be probated, the following is submitted:

I am of the opinion that for protection of your Honorable Board, the heirs at law and next of kin of a deceased employee leaving no widow or descendants should be required to furnish a certified table of heirship. If there is no other estate that is known of, the application for letters of administration in the Probate Court can set out the fact that the value of the estate is unknown but that it does not exceed \$100.00. This would make the bond required of the administrator a very small one. After proof

of heirship was made the estate could be closed by filing a report to the effect that no assets were discoverable. The amount of the refund should not be scheduled in the Probate Court as it does not belong to the estate of the deceased, but is payable directly to the heirs under section 39 of the Municipal Employees' Annuity & Benefit Fund Act. Hurd's Statutes, 1925, p. 545.

(No. 6017—May 19, 1927—C. W. K.)

ANNEXED TERRITORY, POLICE FORCE.

The police force of an annexed village becomes a part of the Chicago Police Department and is subject to all the City ordinances, laws and regulations of that Department.

Hon. Michael Hughes, Superintendent of Police:

In reply to your letter of the 14th instant in which you request an opinion as to the proper procedure in the matter of the retention of the members of the police force of the Village of Mt. Greenwood lately annexed to the City of Chicago, will say that section 443, chapter 24, page 530 of Cahill's Statutes provides as follows:

“All policemen and firemen lawfully in the employ of any city, village or incorporated town, the whole of which may be annexed to another, as provided in this Act, shall be transferred to and become a part of the police and fire department force of such city, village or incorporated town.”

Under this statute the members of the police force of the Village of Mt. Greenwood become a part of the Chicago Police Department.

The ordinances of the City of Chicago supersede those of the annexed territory, and we are of the opinion that

the members of the police force of the Village of Mt. Greenwood would be subject to all ordinances, laws and rules now in force that apply to the Police Department of the City of Chicago.

(No. 6019—May 23, 1927—G. F. M.)

1 PENSIONS, NO CHILD OR WIDOW, REFUND.

A refund to the heirs of a policeman who dies and leaves no children and no widow is payable, to the parents, brothers and sisters of the deceased and their descendants by representation and not as individuals.

2 PENSIONS, HEIRS.

Kindred of the whole and half blood inherit alike in Illinois. Thus the heirs of a half sister inherits the same as the heirs of a sister of whole blood.

NOTE: The Policemen's Annuity and Benefit Fund Act was amended July 7, 1927, to provide for payment of refund to executor, administrator, undertaker, or heirs. Session Laws 1927, p. 282.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to the proper payees of the refund due to the heirs of Alfred Johnston, the following is submitted:

Your letter states that Alfred Johnston, deceased, left a will in which he named his oldest sister Mary Ellen Benson, executrix of his will; and that the petition for letters testamentary show Mr. Johnston left him surviving as his only heirs-at-law, three (3) sisters, five (5) brothers, four (4) nephews and one (1) niece.

Section 39 (e) of the Policemen's Annuity and Benefit Fund Act provides that in a situation of this kind, where there are no children of the deceased policeman, and no widow, the salary contribution accumulation remaining to the credit of the deceased policeman shall be refunded "to

the heirs of such policemen according to the law pertaining to the estates of deceased persons."

Section 1 of chapter 39 of Hurd's Statutes of 1925, page 979, provides in the second paragraph as follows:

"When there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants."

Your letter states that the four (4) nephews are the sons of a deceased half-sister of Mr. Johnston. There is no distinction made between kindred of the whole and half blood in Illinois. Clause 5 of section 1 of the Statute of descent, being chapter 39 above referred to, provides that:

"In no case shall there be any distinction between the kindred of the whole and half blood."

In the case of *Carter v. Carter*, 230 Ill. 507, this clause was held to abrogate entirely, in all cases, the common law rule that kindred of the half blood could not inherit.

Your letter inquires as to whether or not the four (4) nephews together are entitled to a brother's or sister's share and the niece to the full share of a brother or sister. In the case of *Welsh v. Wheelock*, 242 Ill. 380, our Supreme Court held:

"Descendants of heirs in equal degree take *per stirpes* and not *per capita*."

And in the case of *Thornley v. Kershaw*, 204 Ill. 266, it was held that this rule applied to children of a deceased brother or sister.

Under the facts as presented to me, I am of the opinion that the refund due to the heirs of Alfred Johnston should be divided into ten (10) equal parts payable as follows:

One (1) part to each brother (being five parts),
 One (1) part to each sister (being three parts),
 One (1) part to be divided equally among the four
 (4) nephews.

One (1) part to be paid to the niece, if she is
 the only child of her deceased mother.

This will make thirteen (13) checks in all; but before any
 checks are issued you should require to be filed with
 you by some one of the heirs a certified copy of the table
 of heirship as entered of record in the Probate Court in the
 estate of Alfred Johnston.

(No. 6020—May 25, 1927—J. G. D., F. J. C.)

1 ELECTION CONTESTS, ALDERMEN.

The City Council and not the County Court has jurisdiction over election contests for the office of alderman.

2 ELECTIONS, CITY CANVASSING BOARD, CHAIRMAN.

The County Judge is a member of the City Canvassing Board and has no greater power than the other members of the Board, except that he is its Chairman.

3 ELECTIONS, CITY CANVASSING BOARD, POWER.

The duties and powers of the City Canvassing Board are merely ministerial and extend only to the ascertainment of the prima facie result of the election from the proclamation of the judges and clerks of election. Such Board has no power to go behind the returns to determine whether any votes cast are illegal, but it may investigate the correctness of the result by taking testimony to show what the actual proclamation was.

4 ELECTIONS. VALIDITY.

An election called by one who has no legal authority is a nullity and all steps taken in pursuance of it are void.

5 WORDS AND PHRASES, MAJORITY OF VOTES.

Spoiled or defective ballots do not enter in the determination of the question of whether there has been a majority of the votes cast for a particular candidate at an aldermanic election.

*Hon. Oscar F. Nelson, Chairman, Committee on Judiciary
 and Special Assessments:*

Your letter of May 23rd, to this Department requested us to prepare and submit to your Committee prior to

the meeting to be held on Thursday morning, May 26th, an opinion in the matter of the contest filed by T. A. Haffa, contesting the election of Alderman Albert. We have examined the files in this case, including the petition of the contestant Haffa and the answer of the contestee Albert. From such examination we have been able to ascertain that most of the facts involved in the controversy are not contested, and that the petition and answer filed resolve the issues down to questions of law rather than questions of fact. In a general way, without going into detail, we have ascertained from the record that Mr. Haffa bases his right of contest on the result of the election held February 22, 1927, in which he and the contestee and a man named Wolfe, were candidates for alderman in the general election held on that date in the 43rd Ward in the City of Chicago.

The facts that are admitted by the petition and answer show that there was a general election held in said ward on February 22, 1927; that the results of such election were canvassed by the judges and clerks of election in the precincts of the 43rd Ward; that after such returns were made by the judges and clerks of election, the canvassing board of the City of Chicago, consisting of the County Judge, the Corporation Counsel and the Board of Election Commissioners, proceeded to canvass such returns so made by the judges and clerks of election, and made a proclamation of the result of such canvass indicating by such proclamation that the contestant Haffa received 5,742 votes, the contestee Arthur F. Albert received 5,006 votes, and Michael H. Wolfe received 591 votes at such election held on February 22, 1927. The contestant claims that this canvass indicated that 11,339 votes were cast for alderman in said ward; that he received 5,742 votes which was a majority of 72 of the votes cast for alderman at

said election and that he was duly elected; that by virtue of said canvass and proclamation issued, the Clerk of the County Court of Cook County entered such proclamation as a matter of record, and that on April 6th the contestant made application to the County Clerk for his Certificate of Election, which certificate was refused to contestant; that the ground for such refusal by the County Clerk was that an order had been entered by Judge Jarecki in the County Court on the 18th day of March, 1927, which provided that none of the candidates for alderman in the 43rd Ward received a majority of the votes cast at such election, and in the same order required the calling of a supplemental election for alderman of the said ward on the 5th day of April and named the contestant and the contestee as the candidates to be voted for at that election.

The basis of the order entered March 18, 1927, was a re-count made upon the petition of contestee. The said re-count was made and the County Court found after such re-count 11,480 votes cast at the election in the 43rd Ward on the 22nd day of February, 1927, and that contestant received 5,625 votes and contestee received 4,901 votes, and Michael Wolfe received 589 votes, and that there were 365 ballots which were not counted for any candidate but were included in the total of 11,480 votes. Contestee by his answer admits that contestant received 5,742 votes, contestee 5,006 votes, and Wolfe 591 votes for alderman in said ward at said general aldermanic election on February 22, 1927. Contestee further admits in his answer that there was a re-count of the ballots upon his petition by the judge of the County Court of Cook County, and that upon such re-count of the ballots the contestant Haffa received 5,625 votes, the contestee Albert 4,901 votes and Michael H. Wolfe 589 votes, and that

there were 365 ballots which were cast but not counted for any of the candidates, so that it will be seen that there is no controversy as to what took place in the canvass of the returns, nor is there any dispute as to the number of votes received by the candidates on the re-count, although contestee raises the issue as to the 365 votes as he is not advised as to whether or not such ballots were spoiled and defective.

Contestee as a further matter of defense sets up various proceedings in court by which the contestant sought to have set aside the order entered by Judge Jarecki on March 18, ordering a re-count and declaring that no majority had been received by any of the candidates; that there was a supplemental election held pursuant to the order of March 18, 1927, in which contestee and contestant participated and were candidates; that the contestee received 7,507 votes and contestant 7,333 votes; that the said contestee was legally elected alderman on the 5th of April, 1927; that on March 23, 1927, the contestant filed a petition for a writ of mandamus in the Superior Court of Cook County seeking to compel the Hon. E. K. Jarecki, Judge of the County Court, to expunge the order of court entered on March 18, 1927, and that by the institution of said mandamus proceedings contestant raised the same issues involved in the case presented by him in his petition to the City Council to contest the election. Contestee sets up as a further matter of defense his denial that the County Court was without jurisdiction to re-count the votes, and denies that the order made by Judge Jarecki on March 18, 1927, was null and void. Contestee admits that the City Council is judge of the election and qualification of its members, and that it may canvass and re-count, if necessary, the ballots cast at any election, and determine other ministerial ques-

tions, but that it is not clothed with judicial power to determine which of two elections is valid, nor can it determine questions of whether or not there should be a run-off election. Such questions are to be determined by the County Court, and when determined can not be collaterally attacked. As a further matter of defense in said action contestee denies that the order of March 18, 1927, was void, and shows on its face that the contestant received a majority of the votes cast for alderman at the election on February 22, 1927, and asserts that the construction and meaning of the statute is a judicial question to be determined by the court, and having been so determined, is binding upon the contestant and the contestee; and that the City Council should respect and be bound by the judicial question which the court has determined; and that said contestant is not the duly elected alderman of the 43rd Ward by virtue of the election held on February 22, 1927; and prays that the petition of contestant Haffa be dismissed.

It can be seen from an examination of the petition and answer in this case that the only questions involved are such as would either give effect to the power of the County Judge and the Canvassing Board to proceed as they have in this case, or for the City Council to take the position that it can, without the act of the County Judge or Canvassing Board, exercise powers given it under the statute as to the qualification and election of its own members. In our opinion the office of alderman being a city office, under the statute the city Canvassing Board would be the proper tribunal in the first instance to make a canvass of the returns and its powers are fixed and created under article V of the Election law, as prescribed in sections 1, 2, 4, 6 and 7, which are in part as follows:

“Within seven days after the close of such election, the county judge, with the assistance of the city attorney and the board of election commissioners, who are hereby declared a canvassing board for such city, shall open all returns left, respectively, with the election commissioners, the county clerk, and city comptroller, and shall make abstracts or statements of the votes in the following manner, as the case may require, * * * all votes for city officers on another sheet * * *.

“It shall be the duty of such board of canvassers to canvass and add up and declare the result of every election hereafter held within the boundaries of such city, village or incorporated town, and the county court shall thereupon enter of record such abstract and result, and a certified copy of such record shall thereupon be filed with the county clerk of said county, and such abstracts or results shall be treated by said county clerk in all respects as if made by the canvassing board now provided by law, and he shall transmit the same to the Secretary of State or other proper officer, as required by law. And such abstracts or results so entered and declared by such county court and a certified copy thereof shall be treated everywhere within the State and by all public officers with the same binding force and effect as the abstract of votes now authorized by the general law of the State.

“The county clerk shall make out a certificate of election to each of the persons having the highest number of votes, as declared by the order of said court, for the several city and town offices within said city, including aldermen, and deliver such certificate of election to the person entitled to it on his application.

“If, upon opening the various returns so made by the board of canvassers as aforesaid, there shall be anything to indicate that a change has been made in such returns since signing the same by the judges or clerks, or if any fraud in any respect touching such returns, it shall then be the duty of said canvassing board to have all the tallies opened and examined. If there shall be any doubt as to the genuineness of such returns for any precinct, and as to the actual votes as originally returned, and the truth respecting

the same remains uncertain, it shall be the duty of such canvassers to examine any person or persons who were present at the time of the proclamation so made by the judges of election in such precinct, about which any doubt arises, and the board shall be permitted to place such parties or witnesses on oath, and examine them touching the same, and it shall be their duty to call such parties who were present at the time of such proclamation to come before them, and a subpoena may be issued by the county court, under the direction of said board, compelling any such witnesses to come before said board and give their evidence touching the matter in controversy; and thereupon it shall be the duty of said board to declare the result of the vote in any such precinct in regard to which any question arises, as it was proclaimed by the judges of election after the canvass by them in such precinct, which result when so declared, shall be binding and conclusive.

“The county judge shall be the presiding officer of such canvassing board, and a majority of such canvassing board shall have the right to declare the result, and the result, when so declared, the said county judge shall cause to be entered of record in his court as aforesaid which shall be conclusive as to the votes cast at such election in all the precincts of such city.”

In article IV of the Election Act, section 14, the following provision is contained:

“When the canvass of the ballots shall have been completed, and the poll clerks shall have announced to the judges the total number of votes received by each candidate, each of the judges of election in turn shall then proclaim in a loud voice the total number of votes received by each of the persons voted for in such precinct, and the office for which he is designated, and the number of votes for and the number of votes against any proposition which shall have been submitted to a vote of the people. Such proclamation shall be *prima facie* evidence of the result of the canvass of such ballots.”

Section 6 of part 4, article XII, chapter 24 of the Cities and Villages Act, provides:

“The candidate receiving a majority of the votes cast for alderman in each ward at any general or special election shall be declared elected. In the event that no candidate receives a majority of such votes in any ward or wards a supplementary election shall be held at the time prescribed in the preceding section. At such supplementary election the names of the candidates in each of such wards receiving the highest and second highest number of votes at the preceding general or special election and no others shall be placed on the official ballot: *Provided, however,* that if there be any candidate who, under the provisions of this section would have been entitled to a place on the ballot at the supplementary election except for the fact that some other candidate received an equal number of votes, then all such candidates receiving such equal number of votes shall have their names printed on the ballot as candidates at such succeeding supplementary election. The candidate receiving the highest number of votes at such supplementary election shall be declared elected. Such supplementary election shall be deemed a special election under the election and ballot laws in force in the City of Chicago and shall be governed thereby except in so far as such laws are inconsistent with the provisions of this Act.”

It will be seen that the County Judge is a member of the City Canvassing Board, and in addition thereto is designated as the Chairman of said Board under the provisions of the statute. The question of the powers and duties of the Canvassing Board have been fixed and determined in numerous decisions in this state. These decisions are as far back as the 15th Illinois Supreme Court Reports, in which is found the case of *People ex rel. Brewster and Jones v. Kilduff*. At page 500 the court said:

“By subsequent sections, the judges and clerks of election are required to keep tally lists, and lists of

voters, and after the voting is closed, to canvass the ballots, and the 'judges or board of election shall make out a certificate under their hands, stating the number of votes each candidate received,' etc., and 'said certificate, together with one of the lists of the list of voters, and one of the tally papers,' etc., shall be kept and returned by one of the judges of election to the proper persons or officers. The officers who receive these returns, in a certain sense, constitute also a board of election canvassers. But where no contest is entered, they can only declare the result shown by the certificates. But they do not sit to pass upon the qualifications of votes or the reception of the ballots; nor whether, in making up the result of the poll, ballots should or should not be counted. These questions legitimately arise before this second or any subsequent election board, in cases of contested elections, when they may hear and determine these prior questions."

Then in *Wells v. Robertson*, 277 Ill. 534, the court said, page 539:

"The members of the canvassing board are mere ministerial officers, and it was not within their province either to determine the constitutionality of our statute on women suffrage or the constitutional question whether or not such associate judges belong to the class of officers for whom women may legally vote under said act. Their duty is a mere mechanical or mathematical duty. They can only compute the votes cast for the several candidates that are duly certified to them and declare the result. They had no right to go behind the returns and determine whether any of the votes cast were illegal. The writ of *mandamus* is not the proper writ to finally determine the right of any candidate to an office, as the canvassing board had no right or power to decide the legal points in question, the circuit court had no right or power in that action to compel it to make such a decision, and if it did make the decision it cannot estop appellant to assert his rights in this suit."

Then as to the question of the power of the County Court in matters pertaining to its jurisdiction with ref-

erence to election contests, the Supreme Court has on numerous occasions held that the County Court has no jurisdiction to decide contested elections for office of aldermen. This was decided in the case of *Linegar v. Ritzenhouse*, 97 Ill. 208, and has been universally adopted as the law in this State by all of the decisions that follow this decision. It will be seen that under the statute, and under the various decisions in this State, that the Canvassing Board is purely a ministerial body having no powers to make inquiries as to the result of elections beyond ascertaining what the *prima facie* result of an election is from the proclamations made by the judges and clerks of election. In the section above referred to with reference to what constitutes the *prima facie* result of the election, it will be ascertained that such *prima facie* result comes from the proclamation of the judges and clerks of election in the precinct, and the scope of inquiry fixed by the statute in reference to the Canvassing Board is limited entirely to ascertaining what the proclamation of the judges and clerks was in the precinct. This being the case, it will necessarily follow as a matter of law that the sole duty and the only duty devolving upon the Canvassing Board is to ascertain the result of the election from the returns that are before it, or make investigations as to the correctness of those results by taking testimony to show what the actual proclamation was that was made by the judges and clerks of election. A reference to the statute above quoted will indicate that the County Judge is a member of the Canvassing Board and that his duties are fixed by the statute creating the Canvassing Board, and the only duties devolving on him under the provisions of the Act are to act as Chairman of the Board, and after the Canvassing Board has tabulated the result and spread the tabulation on the records of his court, to certify the same to the County Clerk. And in addition

thereto he acts as a member of said Canvassing Board, and is controlled in his action by the decision of a majority of that Board. Therefore, any act that he performs in effectuating the action of such Board is purely a ministerial and mechanical act requiring the exercise of no judicial discretion. He has no fuller or broader power than any other member of the Canvassing Board, and in no sense can his act, while acting as a member of this Board, be considered an exercise of a judicial function. The statute does not give the County Court any power to correct any mistake or fraud, or expunge any fraud or mistake from the returns made by the judges and clerks of election, except the power that is conferred upon the Canvassing Board, and his jurisdiction and power is limited by the terms and provisions of the act creating and constituting a Canvassing Board. He has no right, in making such returns, to examine the ballots or pass on any question as to whether or not the persons who voted at an election were proper or qualified voters. This duty devolves on the Board or court having jurisdiction under the statute to hear contested election matters. The jurisdiction of the County Court with reference to contested election matters is fixed by the statute on elections, chapter 46, under the heading "General Elections," a reference to which will be found in Volume 4 of Callaghan's Illinois Statutes Annotated, at page 3266, paragraph 111, which says:

"The county court shall hear and determine contests of election of all other county, township and precinct officers, and all other officers for the contesting of whose election no provision is made."

It is conceded by the answer and by the petition that the question of contested elections in so far as they refer to aldermen is cognizable only by the City Council itself. This question does not require on the part of the City

Council the review of the exercise of a judicial function on the part of the court. It only requires the exercise of a ministerial function on the part of the body which is qualified under the statute with the power to exercise this ministerial function.

On the admitted facts in the records in this case it is apparent that at the first election of February 22, 1927, the result of the canvass shows that the contestant received more votes by the canvass of the Canvassing Board than the combined votes of the contestee and the candidate Wolfe, and that even if the County Court had the power and the right to re-count the ballots as it did re-count them, that the result of such re-count indicates that the contestant after such re-count received more votes than the combined votes of the contestee and the candidate Wolfe. We must assume that the re-count of the ballots made on the petition of the contestee was a true and correct count of the ballots as they appear and were deposited in the ballot boxes, and while the City Council should be governed by the adjudicated cases of courts of common jurisdiction, where the court is functioning as a judicial tribunal, yet, where the act of the court is purely ministerial, the City Council would not be bound by such ministerial act on the part of the court any more than it would be bound by the ministerial act of one of the officers of the City where such officer was acting beyond the scope and power of his authority. So that the City Council in arriving at and determining what is the true vote and what is the result of this election, are simply exercising the powers conferred upon it by the statute, they being the absolute judges of the election and qualification of their members; and in exercising this ministerial function they have the right to take into consideration and follow the judicial directions and constructions

of the various statutes which have been construed by the courts. We are of the opinion that in construing Section 6 of the Non-Partisan Election Law that the common everyday meaning should be given to the words used in that section to give it force and effect. The courts have on numerous occasions construed and given effect to the meaning of what a majority of votes on a proposition or candidates consists of. This very point has been decided by the Supreme Court of Indiana in the 182nd Supreme Court Report of Indiana in the case of *Spickerman v. Goddard, et al.*, page 523, where the court said at page 534:

“Appellees cite *State v. Clausen* (1913), 72 Wash. 409, 130 Pac. 479, 45 L. R. A. (N. S.) 714, which held that under a statute requiring a proposition to issue bonds to be ratified by ‘three-fifths of the qualified voters of the said city,’ ballots rejected as unintelligible or illegal should not be counted in determining the aggregate. In *City of South Bend v. Lewis* (1894), 138 Ind. 512, 37 N. E. 986, there was involved the question of the annexation of a town to that city. The question was voted on at the time of the regular city election. In South Bend there were cast 1,750 votes for annexation, and 237 votes against it. In the town there were 39 votes for, and 6 against. The total number of votes cast for candidates at the same time, in the city, was over 5,000. The first section of the statute, authorizing the consolidation, provided that ‘a majority of the qualified voters of the town, and a majority of the qualified voters of the city shall vote in favor thereof.’ The sixth section, relating to the canvass and return, provided that if ‘a majority of the votes given * * * in favor of * * * annexation,’ a declaration of union should follow. This court held that only the voters who voted on the proposition could be considered in fixing the basis for the determination of the majority. There appears much conflict in the conclusions reached by various courts of last resort as to the proper basis for calculation under statutes similar to the Minnesota, Washington and Indiana ones above noted. In the

monographic note to *State v. Clausen*, 45 L. R. A. (N. S.) 715 *et seq.*, appears a comprehensive collection of authorities on the subject. In our judgment, by the greater weight of American authority, under statutes of the character indicated, blank and illegal ballots must be rejected in fixing the basis. In this case, however, as we view the statute, it is essentially different from those above discussed, and eliminates from serious consideration important questions presented by those statutes or others of like import. This statute fixes the 'legal votes cast' as the basis. Had the election been held by paper ballots instead of machines, it is manifest that a blank ballot cast could not be deemed a legal vote. If the voter honestly, but through ignorance or carelessness, failed to mark his ballot in substantial compliance with the provisions of section 4, *supra*, of the act, the ballot deposited could not constitute a legal vote. And so with voting on the machine. One who, through ignorance or carelessness, failed to so adjust the voting key as to register his choice cannot be held to have cast a legal vote. In our opinion, under the provisions of the Proctor Act the decision of the trial court was correct, and its judgment is affirmed."

The facts in this case indicated that there were 6,821 votes cast whose names were entered on the pole lists, 3,393 voted yes, 2,931 voted no, making a difference of 497 votes between the poll list number and the number of votes cast. The Election Commissioner who canvassed the returns certified that there was a majority of 462 votes in favor of yes, and the lower court sustained the Election Commissioner and this position was again sustained in the case above cited.

In the case of *Douglass v. Pike County*, 101 Supreme Court Reports, at pages 677-688, it is said:

"There is no doubt that, in general, when an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by law, whether it be a bare majority or two-thirds or three-fourths, is de-

terminated by the result of the vote cast, without regard to the number declining to vote; and this is upon the ground that a failure to vote is assumed, or may be presumed, to be an acquiescence in whatever result may be produced by the action of those who feel a sufficient interest in the election to go to the polls and vote, and for the further reason that in most cases there is no mode by which the number of absentees can be ascertained."

The precise question under consideration was presented to and passed upon by the Supreme Court of Illinois in *People v. Hedlund*, 309 Ill. 280.

This was a *quo warranto* proceeding filed against Hedlund and others as members of the Board of Education of Community High School District No. 511 in Bureau County and against said district. At the election organizing the district the names of 318 persons appeared on the poll books as voters and 152 votes were cast for the proposition to organize the High School District, 127 votes against it and 39 votes were thrown out as defective. After the organization of the district, the Board of Education was elected. The trial court found the respondents not guilty and entered judgment against the relators for costs, from which judgment an appeal was perfected to the Supreme Court.

The case involved the construction of the phrase, "a majority of the inhabitants * * * voting on the proposition," and we quote from the language of the Supreme Court in that case (pp. 282-283):

"It is contended by the appellants that a proper construction of the language of this section requires that the proposition must receive a majority of all votes cast at the election. Appellees contend that the above language means that if the proposition submitted receives more votes for than against, such proposition must be deemed to have carried, and that the 39 ballots thrown out because defective were not votes on the proposition. The thirty-nine electors who

gave in these ballots were voters at the election though their ballots gave no expression either for or against the proposition to be determined by the election. Their names appear on the poll-books as voters at such election. It does not, however, follow that they must be counted as voting on the proposition, as contemplated by the validating act. Those voting on a proposition could only be determined by the ballots. A majority of the votes cast at an election is not synonymous with the majority of the inhabitants voting on the proposition. The number of votes cast at an election is determined by the poll-books, while a majority of the votes cast on a given proposition is determined by the ballots. (*Chestnutwood v. Hood*, 68 Ill. 132.) The Supreme Court of New Jersey, in construing the phrase, 'a majority of the electors qualified to vote for members of the legislature voting thereon,' (this being a requirement for the adoption of an amendment to their constitution), held: 'By the words "electors voting thereon" are intended the electors who exercise the right of suffrage in such manner that their votes should, under the law, be counted for or against the proposition submitted, and although the number of names on the poll-lists may represent the number of qualified electors who attempted to vote and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted in the constitutional sense, and that the rejected ballots were not votes. * * * The presumption is that the election officers acted rightly, and that therefore the rejected ballots were rejected for legal cause and were not votes for or against any amendment; that all the votes legally capable of being counted for or against the amendment were qualified "electors voting thereon," of whom a majority approved and ratified it.' *State of New Jersey v. Wurts*, 63 N. J. L. 289, 45 L. R. A. 251.

"In this case there were 318 inhabitants voting at the election. Deducting the 39 votes thrown out, there were 279 votes on the proposition. Of these, 152 voted 'for' and 127 voted 'against.' A majority of the inhabitants of the territory voting on the proposition voted in favor of the organization of the district.

The district therefore comes within the scope of the validating act of 1921, and the trial court was right in so holding."

Under the overwhelming weight of authority the phrase, "majority of the votes cast for alderman," means a majority of the legal votes cast and counted for the candidates for that office and in determining whether any candidate received a majority of the votes cast, ballots spoiled or defective and not counted for any candidate should not be counted in determining the total number of votes cast. *Covina Union High School District v. McClellan* (Cal. D. C. A., rehearing denied by Supreme Court, August 7, 1924), 228 Pac. 409; *Catlett v. Knoxville S. & E. Ry. Co.*, 120 Tenn. 69, 112 S. W. 559; *State v. Wurts*, 63 N. J. L. 289, 43 Atl. 744; *Wightman v. Village of Tecumseh*, 157 Mich. 326, 122 N. W. 122; *Attorney General v. Genesee County*, 166 Mich. 61, 131 N. W. 163; *Hopkins v. City of Duluth*, 81 Minn. 189, 83 N. W. 536; *Spickerman v. Goddard*, 102 Ind. 523.

With reference to the contention of contestee that the supplemental election held on April 5, 1927, conferred upon him the right to the office of alderman, it is sufficient to say that that election was not called by any authority legally constituted to call such an election and that the order of the County Court of March 18, 1927, calling such an election was a nullity, and all steps taken in pursuance thereof are void and without warrant. It is essential to the validity of an election that it be held at the time and place provided by law and called pursuant to the proper statutory authority; an election called otherwise is void. On this proposition we quote from *Stephen v. People ex rel. Rafter et al.*, *supra*:

"In *Clark v. Board of Supervisors, etc.*, 27 Ill. 310, it was said: 'If an election were held without warrant of law, or if it were ordered by a person or

tribunal having no authority, there could be no doubt that the whole proceeding would be absolutely void. Such an election, and every subsequent step, would be unauthorized and void, and therefore incapable of ratification by the county authorities.' In *Marshall County v. Cook*, 38 Ill. 44, where, in the case of an election to ascertain whether a county would make a subscription to the stock of a railroad company, the statute authorized the board of supervisors of the county to call an election, and it was called by the county court, it was held that the election so called was without authority of law, and that a subscription to the stock of a railroad company, and bonds issued thereon by the board of supervisors, in pursuance of such an election, were absolutely void. In *Force v. Town of Batavia*, 61 Ill. 99, a case of similar election in a town, where, upon the application of any fifty voters of a town, the statute made it the duty of the clerk of the town to call the election, it was held, that an election under the provisions of the act, called by the supervisor of the town, was void,—that the town clerk, and he only, could legally call such election. It was said: 'The election having been called by an unauthorized person, that, and its results, are void and of no effect. Neither has any greater validity than the unauthorized action of a mass meeting would have.' We view the call of the election, here, by the mayor alone, equally without authority as it was in the cases cited, and that they, with the other authorities they refer to, must be held as conclusive of the present case. * * * It was remarked in *Marshall v. Silliman*, 61 Ill. 224, in reference to an actual vote of a town for a subscription, at an election held without authority of law, and where there was a subsequent act of the legislature purporting to legalize and confirm the election: 'It can not be said that the town has ever consented to the creation of this debt. The so-called vote was an idle form. Persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceeding as a nullity.' "

In the *Stephens case* it might be noted in passing that the relators "voted at and took an active part in the election,"

Reference is also made in this connection to *People ex rel. Anderson v. Czarnecki et al.*, 312 Ill. 271; *People ex rel. Dever v. Sweitzer*, 314 Ill. 300, and to *People ex rel. Commerford v. Miller*, 314 Ill. 474.

After a review of the authorities cited by both the contestant and the contestee, we are of the opinion that the County Court was without jurisdiction to re-count the ballots of the election of February 22, 1927, but that in assuming such power it obtained a result which, if properly effectuated, would have shown that the contestant received a majority of all the votes cast on the recount in addition to the finding of the Canvassing Board; that if frauds and mistakes were perpetrated at such election, the Canvassing Board and the County Court exceeded their power and authority in trying to expunge such frauds and mistakes, and that the contestee had his adequate remedy at law to have such mistakes and frauds investigated by the properly constituted tribunal. This tribunal would be the City Council.

We therefore beg to advise you that it is our opinion that the City Council has the power and the right under the law to take the returns of the Canvassing Board as a basis of determining who is entitled to the seat in the City Council, and who received a majority of the votes at the general election held February 22, 1927; that under the law the City Council will be bound to determine that the contestant Haffa received such majority and is entitled to the seat in the Council regardless of the fact of whether or not the election certificate has been issued after the subsequent election which in our opinion was called in contravention of the laws of this State.

(No. 6021—May 25, 1927—J. G. D. et al.)

1 ALDERMAN COYLE, CERTIFICATE OF ELECTION, VALIDITY.

The certificate of election issued to James G. Coyle as against Robert E. Barbee was based upon a legal majority of the votes actually cast at the general aldermanic election of February 22, 1927 and gives Mr. Coyle a legal title to the office of alderman of the 17th Ward.

2 ALDERMANIC ELECTION, MAJORITY, MEANING.

Under the Aldermanic Non-Partisan Election Law the phrase a "majority of votes cast for alderman" (sec. 6, par. 4, art. XII Cities and Villages Act—par. 190, chapter 24, Smith-Hurd Stat. 1927) means the votes legally and actually cast at the election exclusive of spoiled and illegal ballots.

3 ELECTION CONTEST, PETITION, IRREGULARITIES MUST BE SPECIFIC.

Irregularities alleged in a petition for a contest of election must be sufficiently specific and full to enable the court from an inspection of the petition to determine whether such irregularities, if true, would have changed the result of the election.

Ald. Oscar F. Nelson, Chairman, Judiciary and Special Assessment Committee, City Council, Chicago, Illinois:

You have requested an opinion relative to the contest of Robert E. Barbee, contesting the election of Hon. James G. Coyle as alderman of the 17th Ward of the City of Chicago. We have examined the petition and notice filed in this case and have ascertained from such examination that there was a general aldermanic election held in the 17th Ward on February 22, 1927, and that at said general election there were only two candidates whose names appeared on the official ballot at said election. The petition specifically sets out sections 5 and 6 of the Non-Partisan Election Act of the State of Illinois.

The petition avers that said election of February 22, 1927, was held under the provisions of the laws governing elections in the City of Chicago and makes no claim as

to any illegality in regard to the calling and the holding of said election. The petition further avers that judges and clerks in each precinct of the 17th Ward canvassed the votes in their respective precincts and made proclamation of such canvass and made due return of such proclamation pursuant to law. The ground for contest appears to be in reference to the canvass of the judges and clerks in the 14th and the 44th precincts, in that the judges and clerks made no return on the tally sheets nor on the statement of votes as required by law of the number of votes cast for either of the candidates; that it appears from the returns in the 14th precinct that 278 registered voters cast their ballots for alderman; that in the 44th precinct, 285 registered voters cast their ballots for alderman; and that in the 13th precinct the contestee, Coyle, is credited with receiving 126 votes and Barbee 113 votes, making a total of 239 votes cast in said precinct, whereas the poll book shows that only 225 registered voters voted in said precinct. As a further ground for contest it is averred that in many precincts of said ward, judges and clerks of election found in the ballot boxes many aldermanic ballots cast by the voters which were not counted for any candidate by said judges and clerks and such ballots were returned by them as defective and objected to ballots.

Contestant also represents that he is informed and believes and so states the fact to be that in a number of precincts votes cast for him were counted for contestee either intentionally or inadvertently; that if all votes cast for contestant had been properly counted and if all the illegal votes cast for contestee had been rejected, contestant would have received a majority of votes cast for such election; that the total number of voters who cast their vote for alderman in said 17th Ward was 13,897 and of this total contestant received 6,706 votes and contestee, Coyle, 6,754 votes, leaving a balance of 337 votes cast but

not counted for any candidate; that no candidate for alderman in the 17th Ward received a majority of the votes cast for alderman in the said ward and that a vote necessary to constitute a majority of all votes cast at said election would be 6,949 votes; that the abstract or statement made by the Canvassing Board was incomplete in that it does not show the total number of votes cast for alderman at said election by the qualified electors of said 17th Ward and shows only a total number of votes cast for the contestant as 6,706 and of contestee as 6,854; that the total number of votes cast in such election was 13,897, of which number a majority is 6,949; that contestant has served notice on the Canvassing Board showing the incompleteness of said abstract or statement and made demand upon the Canvassing Board for the correction of such statement; that he has made demand upon the Election Commissioners to prepare and furnish official supplementary ballots for alderman of the 17th Ward on April 5, 1927; that the Canvassing Board refused and still refuses to correct its omissions and clerical errors in said abstract of the canvass of the returns above referred to and refuses to file with the County Court a correct abstract of the statement of the number of votes cast for alderman in the 17th Ward; and that the Board of Election Commissioners refused to provide for the holding of a supplementary aldermanic election in the 17th Ward on the 5th day of April, 1927.

From an examination of the record, we are of the opinion that the main issue involved in this case, as it is presented to us, is whether or not the contestee, Coyle, received a majority of the votes cast at this particular election. The grounds of contest as they have reference to the vote in the 13th, 14th and 44th precincts are so general in their character that it cannot be determined from

a reading of the petition whether or not the actions of the election officials in these precincts in any way changed the result of the election or the count of the ballots as they were cast in those precincts. We take it as a matter of law that sufficient facts must be alleged in the petition as to specific instances of irregularities so that it could be determined from an inspection of the petition that such irregularities changed the result of the election. These allegations are of so general a character that we have disregarded them for the reasons above stated.

As to the questions of whether or not either candidate received a majority of the vote cast at such election, it is necessary to bring to your attention the language of section 6 of the Non-Partisan Election Law. In giving construction to this particular language we must have in mind the ordinary interpretation and the meaning of the words used in that section. When construing this section we must take into consideration the general rule laid down by our Supreme Court, in the case of *People v. Stevenson*, 281 Ill. page 25, in which the court said:

“Constitutions, as well as statutes, should be read and understood according to the most natural and obvious import of the language used, without resort to subtle and forced construction for the purpose of limiting or extending their operation.”

This Non-Partisan Act, by its enactment, created a new situation with reference to election of aldermen in the City of Chicago. It fixes the time the general election shall be held and the time when supplemental elections shall be held. In construing section 6 of this Act it must be borne in mind that the Legislature had in contemplation the idea of opening wide the door for nomination of many candidates for this office and it intended to remove the partisanship basis under which these elections were formerly held. In other words, it encouraged the filing of

petitions of persons not affiliated directly with either of the two leading parties and the Legislature had in mind the fact that where none of the candidates received a majority of votes, there would be more than two candidates running at the preliminary or general election to be held in February of every other year. They had in contemplation the process of eliminating all candidates except the two candidates who received the highest number of votes where neither had a majority of the total vote cast. There was nothing in the statute which apparently had in contemplation a situation where only two candidates were voted for or had a right to be voted at the general aldermanic election in February. In the present instance, it was not necessary by process of elimination to place the names of any other candidates on the ballot at the supplemental election. In other words, it is apparent that the person or persons who have the right to become candidates at such general election did not do so and left the field open to the contestant and contestee.

Therefore, in placing a reasonable construction upon the meaning of the word majority as used in section 6 of this Act, we must conclude that the word used as it applies to this case means the greatest number of votes. This position is borne out by cases which had been adjudicated in other jurisdictions where this question has come before the court for determination. There are a number of cases in this jurisdiction which pass on the questions involved as to the meaning of majority as it applies to the particular statute which was under construction but there are no cases directly in point construing the meaning of the word majority in this State with reference to this particular statute under consideration.

The very question involved here was decided by the Supreme Court of Indiana in the case of *Spickerman v.*

Goddard et al., 182 Ind. 523. The court in that case said at page 534:

“Appellees cite *State v. Clausen* (1913), 72 Wash. 409, 130 Pac. 479, 45 L. R. A. (N. S.) 714, which held that under a statute requiring a proposition to issue bonds to be ratified by ‘three-fifths of the qualified voters of the said city,’ ballots rejected as unintelligible or illegal should not be counted in determining the aggregate. In *City of South Bend v. Lewis* (1894), 136 Ind. 512, 37 N. E. 986, there was involved the question of the annexation of a town to that city. The question was voted on at the time of the regular city election. In South Bend there were cast 1,750 votes for annexation, and 237 votes against it. In the town there were 39 votes for, and 6 against. The total number of votes cast for candidates at the same time, in the city, was over 5,000. The first section of the statute, authorizing the consolidation, provided that ‘a majority of the qualified voters of the town, and a majority of the qualified voters of the city shall vote in favor thereof.’ The sixth section, relating to the canvass and return, provided that if ‘a majority of the votes given * * * in favor of * * * annexation,’ a declaration of union should follow. This court held that only the voters who voted on the proposition could be considered in fixing the basis for the determination of the majority. There appears much conflict in the conclusions reached by various courts of last resort as to the proper basis for calculation under statutes similar to the Minnesota, Washington and Indiana ones above noted. In the monographic note to *State v. Clausen*, 45 L. R. A. (N. S.) 715 *et seq.*, appears a comprehensive collection of the authorities on the subject. In our judgment, by the greater weight of American authority, under statutes of the character indicated, blank and illegal ballots must be rejected in fixing the basis. In this case, however, as we view the statute, it is essentially different from those above discussed, and eliminates from serious consideration important questions presented by those statutes or others of like import. This statute fixes the ‘legal votes cast’ as the basis. Had the election been held by paper ballots instead of machines, it is mani-

fest that a blank ballot cast could not be deemed a legal vote. If the voter honestly, but through ignorance or carelessness, failed to mark his ballot in substantial compliance with the provisions of section 4, *supra*, of the act, the ballot deposited could not constitute a legal vote. And so with voting on the machine. One who, through ignorance or carelessness, failed to so adjust the voting key as to register his choice cannot be held to have cast a legal vote. In our opinion, under the provisions of the Proctor Act the decision of the trial court was correct, and its judgment is affirmed."

This case involved facts where 6,821 persons' names were entered on the poll list and 3,393 voted "Yes" and 2,931 voted "No" on a proposition of public policy submitted under the Act of Indiana. There was a difference of 497 votes between the poll list and the number of votes cast, and in this situation the Supreme Court of Indiana laid down the rule above stated.

We are of the opinion that the vote of the persons who actually voted for alderman controls this situation, and it is apparent from reading the petition that of the votes legally cast, contestee, Coyle, received a majority. There is another case decided by the Supreme Court of the United States, volume 101 of the United States Reports. This is the case of *Douglass v. Pike County*, 101 U. S. 677. In the opinion, the court said at page 681:

"There is no doubt that in general when an election is held to determine the choice of a candidate or the determination of some question of public policy the plurality required by law whether it be a bare majority or two-thirds or three-fourths is determined by the result of the vote cast without regard to the number declining to vote, and this is upon the ground that a failure to vote is assumed or may be presumed to be an acquiescence of whatever result may be produced by the action of those who feel sufficient interest in the election to go to the polls and vote, and for the

further reason that in most cases there is no mode by which the number of absentees can be ascertained.”

Applying this principle, we may safely say in construing this Act that where a person appears at the polling place and fails in a legal manner to mark his or her vote in substantial compliance with the law, that such person cannot have been said to have cast a ballot for alderman because there is no method by which it could be or can be determined what the intent of the voter was with reference to casting a vote for alderman. The failure to mark the ballot may be an express declaration of intention that the voter did not desire or did not intend to vote for either candidate for alderman, and under the law no voter could be coerced nor required to cast a vote for alderman. There were other offices voted for at this election; there were persons who voted at the election as primary electors. It may have been their intention not to vote for alderman but simply to cast their ballot as primary electors. So that it can be said that the difficulty of ascertaining the total vote cast for alderman would be practically impossible of solution if a strained construction be given to this statute. We are, therefore, of the opinion that the finding of the Canvassing Board governs and that the issuance of the certificate of election to the contestee, Coyle, gives him a legal and absolute title to his seat in the City Council, especially in view of the fact that we believe that under the statute and under the facts alleged in this petition that the contestee actually received a majority of the votes cast at the general aldermanic election on February 22, 1927.

(No. 6022—June 1, 1927—F. T. H.)

SIGN BOARD. PERMIT. APPLICATION.

In case of a wood or metal sign board extending over a sidewalk, the application for a permit must be made to the Department of Compensation; if the sign is to be within the building line, the application must be made to the Commissioner of Buildings. In case of an illuminating sign, the application should be made to the Commissioner of Gas and Electricity, and approved by the Commissioner of Public Works as to location. The forms for applications may be secured from the respective departments named.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We have your communication of May 23, 1927, inclosing therewith a copy of a request from the Chicago, South Shore and South Bend Railroad Company for a signboard 3 x 15 feet to be erected on East Randolph street viaduct, also inclosing therewith a form of a temporary permit covering the matter.

You request to be advised if the Commissioner of Public Works has authority to grant this company a temporary permit to erect a signboard on the East Randolph street viaduct, also, a request to be informed if the permit attached to your communication meets with our approval.

We have examined all the correspondence, copies of which you have attached to your request, and are unable to ascertain if this proposed signboard is to be an illuminated sign or not. If said signboard is to be made of wood or metal and is to extend over the sidewalk or street, then, application for a permit should be made to the Department of Compensation, which department will determine the compensation for the privilege, in accordance with sections 3257 and 3258 of the Municipal Code of 1922.

If this sign is to be within the building line, that is, not on the street or sidewalk, then the Commissioner of

Buildings by virtue of section 368 of the Municipal Code of 1922 has the control.

If said sign is to be an illuminated sign, that is, electrically or otherwise illuminated, then application should be made to the Commissioner of Gas and Electricity on a printed form furnished therefor by said department. Such application, when made, should be submitted by the Commissioner of Gas and Electricity to the Commissioner of Public Works for his approval as to the location of such sign. See Article III, Illuminated Signs, Chicago Municipal Code, 1922, page 498.

Blank forms for applications as well as permits are in the different offices of the respective departments that are to issue said permits.

(No. 6023—June 2, 1927—G. F. M.)

1 PENSIONS, SUPPLEMENTAL ANNUITY.

A supplemental annuity payable to a widow whose husband died while in the performance of his duty as a municipal employee, and when under 65 years of age, is the difference between the ordinary annuity payable under section 26 or 27 and the maximum annuity payable to the widow had the husband remained in the service at his final salary until he had attained 65 years, which maximum annuity must not exceed sixty per cent of the final salary.

2 WORDS AND PHRASES.

The word "salary" under the Municipal Employees' Annuity and Benefit Fund Act means annual salary which does not exceed three thousand dollars.

Retirement Board, Municipal Employees' Annuity & Benefit Fund:

Replying to your request for an opinion as to what amount of supplemental annuity is payable to a widow

after the date her husband would have reached the age of 65 years, the following is submitted.

Your letter states that the question arises in the case of Mrs. Mary E. McDonald, widow of Leo P. McDonald, a steamfitter who died as a result of injury received in the performance of his duties.

Section 33 of the Municipal Employees' Annuity and Benefit Fund Act provides for the payment of "compensation annuity" to the widow of an employee whose death shall result from injury incurred in the performance of an act of duty until such time as the employee would have attained the age of 65 years had he lived, and for the payment of "supplemental annuity" thereafter. This "supplemental annuity" shall be equal in amount to the difference between the amount of annuity provided for such widow under section 26 or section 27 of the Act, and the amount of annuity to which such widow would have had a right, if her husband had lived and continued in the service until he attained an age of 65 years upon the salary at the rate of his final salary. "Salary" as defined in the Act means annual salary, but not exceeding \$3,000.00 in amount.

Section 37 of the Act provides that no amount of annuity in excess of an amount equal to 60 per cent of the highest salary considered for annuity purposes in accordance with the provisions of the Act (viz., 60 per cent of \$3,000.00) which shall have been received by the municipal employee concerned shall be granted or paid to the widow of any municipal employee whose death shall result from injury incurred in the performance of an act of duty.

Under the facts as stated, I am of the opinion that it will be necessary to ascertain the maximum annuity which would have been payable to Mrs. McDonald had her husband remained in the service at his final salary

until he attained the age of 65 years before dying in order to ascertain the amount of "supplemental annuity" which will be payable to Mrs. McDonald; the "supplemental annuity" being the difference between the ordinary annuity now payable to her under section 26 or section 27 and such maximum annuity so ascertained, bearing in mind that such maximum annuity cannot exceed 60 per cent of Mr. McDonald's final salary, nor 60 per cent of a maximum salary of \$3,000.00.

(No. 6024—June 3, 1927—G. F. M.)

PENSIONS, CHILDREN'S ANNUITY, PAYMENT.

The conservator of a policeman's widow is the one to receive and receipt for a child's annuity upon the filing of a certified copy of conservatorship with the Retirement Board.

Retirement Board, Policemen's Annuity & Benefit Fund:

Complying with your verbal request for an opinion as to whom shall be paid the child's annuity of Vincent Doyle, a minor, when the widowed mother of the minor child is under conservatorship, the following is submitted:

Section 44 of the Policemen's Annuity and Benefit Fund Act provides among other things as follows:

"Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child, who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child."

Section 5 of chapter 86 of the Revised Statutes of Illinois, referring to a conservator duly appointed by the court, says:

"Such conservator shall have the care and management of the real and personal estate of his ward, and

the custody of his person unless otherwise ordered by the court, *and the custody and education of his child* where no other guardian is appointed, unless the court orders otherwise. But this act shall not be so construed as to deprive the mother of the custody and education of the children without her consent, if she be a fit and competent person to have such custody and education."

I am of the opinion that where a conservator has been appointed for a policeman's widow who is in receipt of a pension and who has a minor child entitled to a child's annuity, the check for the child's annuity should be delivered to the conservator of the mother as constructive guardian of such minor child, pursuant to section 5 of chapter 86 hereinabove set out. A certified copy of the letters of conservatorship should be filed with your Honorable Body before any check is delivered to such conservator.

(No. 6025—June 3, 1927—G. F. M.)

PENSIONS, AMOUNT CONTRIBUTED.

One who has retired from the service of the City before attaining age 55 and without having paid into the fund sufficient moneys to equal salary deductions for twenty years, is not entitled to a pension under the Municipal Employees' Pension Act of 1911 as amended in 1917, although he has been in the City's employ for 23 years.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion covering the case of Matthew Tracy, lineman, who is applying to your fund for a pension under the provisions of the Act of 1911, the following is submitted:

Your letter states that Mr. Tracy has filed affidavits showing a period of service covering eight (8) years of service before certification and fifteen (15) years following certification, making a total of twenty-three (23) years, his last service having been in 1918; that Mr. Tracy was born February 11, 1871, and attained the age of fifty-five (55) years on February 11, 1926; that he has only contributed \$126.00 and that the total contribution for a twenty (20) years' period of service should have been \$600.00.

Section 8 of the Municipal Employees' Pension Act of 1911 (Hurd's Stat., chap. 24, sec. 1040, p. 527) provides that any employee, other than one who has been in the military service, who has been in the service of the City for a period of not less than twenty (20) years and who shall retire from the service of the City before attaining the age of fifty-five (55) years, shall have the right to continue to pay into the fund monthly at the prescribed rate and may thereby remain in good standing in said fund and shall have the right to become a beneficiary under said fund upon attaining the age of fifty-five (55) years, but contains the following provisions as an amendment to the Act of 1917:

“Provided, such employee shall, in the event that he or she retires from the service of such city, village or town before deduction shall have been made from the salary or wages of such employee for a period of twenty (20) years, pay into such fund, within one year from the date when he or she shall retire from the service of said city, village or town, a sum which, together with all moneys previously deducted from the salary or wages of such employee and all moneys paid to the treasurer of such city, village or town by such employee for the benefit of the fund hereby created, as prescribed in section 1 of this Act, is equal to the full amount which would have been deducted and applied to said fund during a period of twenty

(20) years, with five (5%) per cent interest thereon from date of retirement."

Under the facts as you have stated them to me, I am of the opinion that Matthew Tracy is not entitled to be paid a pension under the provisions of the act of 1911 as amended in 1917.

(No. 6026—June 4, 1927—J. J. C., J. G. D.)

1 SUBWAYS, PUBLIC UTILITIES EQUIPMENT, RELOCATION.

The City Council has power to order the relocation of the facilities and equipment of public utilities situated in public streets of the City without liability to the City for costs of relocation, whenever made necessary by subway construction.

2 LOCAL IMPROVEMENTS, SUBWAYS.

A subway made necessary by track elevation adds to street capacity and is a local improvement of a public nature.

Mr. I. L. Sears, Sec'y, Local Transportation Committee:

Your letter of May 23rd, requesting this office for an opinion concerning the right and power of the City to compel public utility companies to relocate their facilities and equipment in public streets where and whenever necessary by reason of subway construction, is received.

In reply, we beg to advise that the general rule, very clearly established, is that public utility companies take their rights in City streets, implied where not expressed, distinctly subject to the right and duty of the City to improve and regulate the use of its streets; that such companies, upon acceptance of their respective grants from the City, are held in law to have agreed by implication, where not by express covenant, to comply with the reasonable demands of the City in the exercise of its delegated

legislative power over streets, and that the companies cannot be heard to complain when called upon to comply with the terms of that agreement.

We have recently tried this question in the Supreme Court of this State in a mandamus action brought by the City against the Chicago City Railway Company (*People ex rel. City of Chicago v. Chicago City Ry. Co.*, 324 Ill. 618), where the City Council passed an ordinance providing for the widening of 22nd street from Michigan avenue to Archer avenue by the condemnation of a 54 foot strip on the south side of the street. The width of the roadway prior to the widening was 34 feet. The street railway company had for many years operated its double track line in the center of the 34 foot roadway, leaving eleven feet of clear roadway on either side of the tracks. If the tracks were permitted to remain as thus located, there would be eleven feet of clear roadway on the north side of the street and 63 feet on the south side. This was considered to be a dangerous and improper condition and accordingly demand was made upon the company to relocate its tracks in the center of the street as widened, leaving roadways of equal width on either side of the tracks. The cost of such relocation was estimated to be \$300,000. The company refused to make the change unless the cost were borne by the City. Accordingly the City filed its petition in the Circuit Court of Cook County for a writ of mandamus directing the company to relocate its tracks as demanded. The cause was tried on the City's demurrer to the company's answer and was determined adversely to the City in the trial court. Upon appeal to the Supreme Court the Circuit Court was reversed and the City held entitled to the writ. It was contended by the company that the demand of the City was in effect a taking and damaging of its property for public use

without just compensation, and a deprivation of property without due process of law. It was claimed by the City that its demand was an exercise of its police power, to which the rights of the company in the street were subordinate. The contentions of the City were sustained and those of the company overruled. The Supreme Court there said (p. 621 *et seq.*):

“The permission given a railway company to use the streets of a city is in subordination to the general power of the municipality over its streets. The City is under no obligation to conform its treatment of its streets to the construction of the company’s roadbed, but, on the contrary, the company must conform the construction of its roadbed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers concerning the use, control, regulation and improvement of its streets. *Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvement of such streets and subject to such changes in the construction of roadbeds as improved and changed conditions may demand.* * * * The power to enact police regulations operates on all alike. This fundamental principle is incident to and part of government itself, and need not be expressly reserved when rights or property is granted to individuals or corporate bodies. They take subservient to this power. * * * The ordinance specifically provides that nothing contained in it shall be construed to deprive the City of its right to exercise the police power which it had at the time the ordinance was passed, *but this provision was merely declaratory of the law as it already existed. There is nothing in the ordinance to indicate that the City has surrendered any of its power and authority to control and improve its streets, and if there were, it would be void. The power of the City to protect the public in the use of its streets cannot be abrogated by ordinance or relinquished by contract.* * * * If the City could not change the grade or width of its streets except upon condition that it make compensation to the railway company, the gas

company, the water company, the telephone company, the electric light company, and other companies occupying the streets under a contract with the City, for inconvenience and expense thereby occasioned, the duty of the City to protect the public in its use of the streets and from time to time, as the community develops, to keep the streets in such condition as will accommodate public safety and convenience, would be seriously interfered with."

It will be observed that the court included all types of utilities within the rule announced and did not confine its holding to street railways.

The same rule has been applied to gas companies in the cases of *Anderson v. Fuller*, 51 Fla. 380; *Columbus Gas Light & Coke Co. v. Columbus*, 50 Ohio St. 71; *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453; to electric light companies in *City of Sullivan v. Central Ill. Pub. Service Co.*, 287 Ill. 19; to street railway companies in the case quoted from, and *Snouffer v. C. R. & M. City Ry. Co.*, 118 Ia. 287; *People ex rel. v. Geneva etc. Co.*, 112 App. Div. (N. Y.) 581 (affd. 186 N. Y. 516); *City of San Antonio v. San Antonio St. Ry. Co.*, 39 S. W. (Tex.) 136; to water companies in *National Water Works Co. v. City of Kansas*, 28 Fed. 921; to railroads in *C. B. & Q. R. R. Co. v. People*, 200 U. S. 561; *C. M. & St. P. Ry. Co. v. Minneapolis*, 232 U. S. 340; to elevated railroads in *Brooklyn El. R. Co. v. Brooklyn*, 37 N. Y. Supp. 560, and to telegraph companies in *Postal Tel. Co. v. B. & O. C. T. R. R. Co.*, 219 Ill. App. 304.

It appears, therefore, that the rule is universally recognized. That it applies to subway construction we have no doubt. The construction of a subway by the City for local transportation is merely the creation of additional street capacity in legal effect the same as a street widening, and is for all practical purposes a local improvement of a

public character as contemplated by the authorities cited and by the Local Improvement Act of this state. Indeed, if this were not so it would be unlawful to levy a special assessment for subway construction. Our local improvement legislation does not specifically mention subways but in our judgment it is broad enough to include them. The Rapid Transit Act of New York specifically authorizes the levy of a special assessment for subway construction, as does the law of Pennsylvania. This lends authority to the proposition that a subway is a local improvement of a public character, and being so, the rule announced in the opinion quoted from applies to subway construction.

It is clear, therefore, that with reference to the subject matter of your inquiry, viz., liability for the cost of relocating utility equipment, the rule is established independently of any legislative enactment, and there is, therefore, no occasion to refer to it in such legislation.

(No. 6027—June 8, 1927—G. F. M.)

PENSIONS, DISABILITY, REINSTATEMENT.

A fireman is entitled to immediate reinstatement in the same rank or grade held at the time of retirement upon a pension on account of physical or mental disability and a recovery from it.

Mr. Edward A. Maloney, Secretary and Deputy Fire Commissioner, Fire Department:

Replying to your verbal request for an opinion as to the status of disabled pensioners of the Fire Department restored to service after recovery from disability, the following is submitted:

Section 9 of the Firemen's Pension Fund Act of 1917 provides for the retirement on a pension of any fireman

becoming physically or mentally disabled so as to render necessary his retirement from active service. The same section also contains the following provision:

“If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal or chief of the fire department of such city, who shall thereupon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement.”

It seems to follow necessarily that whenever a member of the Fire Department is retired on pension under section 9 of the Act, the vacancy left in the department because of his retirement is only a temporary vacancy subject to being refilled upon the recovery of such fireman from his disability. Whenever this vacancy is filled, and a permanent vacancy in the same grade should thereafter exist, it naturally follows that the person who was appointed to the temporary vacancy would be transferred to the permanent vacancy and the temporary vacancy again filled, so that the position so temporarily filled will at all times be available upon the return to active service in the department of the member of the Fire Department who had been retired from such position because of disability.

I am of the opinion that the law is very clear that a member of the Fire Department who has been retired on a pension because of disability and who is later ordered by the Pension Board to report back to the marshal or chief of the fire department shall be immediately reinstated in active service in the same rank or grade that such fireman held at the time of his retirement, and that the payment of further pension to him shall be suspended.

(No. 6028—June 9, 1927—F. J. V.)

1 FIREMEN, RETIREMENT, VACANCY, CIVIL SERVICE.

The removal or retirement of a fireman on account of temporary physical or mental disability can only be until his recovery and creates a temporary vacancy which can be filled only temporarily.

2 FIREMEN, REINSTATEMENT, CIVIL SERVICE.

Upon recovery from physical or mental disability a fireman is entitled to immediate reinstatement in the same grade or rank held by him before removal or retirement.

Hon. A. W. Goodrich, Fire Commissioner:

The following state of facts with request for our opinion and direction thereon was received from Mr. E. A. Maloney, Secretary of the Fire Department, to-wit:

"I am in receipt of a communication from the Secretary of the Board of Trustees of the Firemen's Pension Fund, enclosing a copy of the minutes of a meeting of the said Board which was held on May 23, 1927.

"Included in the minutes of the business of the meeting was an order entered by the Board directing that the pension of Henry W. E. Kerr be suspended and that the said Henry W. E. Kerr be ordered to report back to the Fire Commissioner for re-instatement in active service in accordance with the provisions of section 9 of the Firemen's Pension Law.

"For your information I desire to state that Henry W. E. Kerr was retired as a Chief of Battalion on January 1, 1926, on account of physical disability. Upon his retirement his position was filled by certification from the Civil Service eligible list for Chiefs of Battalion.

"At the present time there is an appropriation in this Department for 55 Chiefs of Battalion and there are 55 Chiefs of Battalion employed.

"Will you therefore kindly outline the procedure to follow to the end that the order of the Pension Board and the provisions of the pension law be satisfied,

and at the same time avoid any action in conflict with the appropriation ordinance of 1927?"

Since there are only fifty-five positions of Chief of Battalion provided for by ordinance, it is obvious that either Mr. Kerr, who is ordered to be reinstated in the active service, or the acting Chief of Battalion, who was certified and appointed to the position when Mr. Kerr was retired on pension, must be placed back on the eligible list for reinstatement. This depends upon whether the temporary retirement of a fireman to pension by the Board of Trustees of the Pension Fund creates a vacancy in his position such as can be permanently filled by the certification and appointment of another from the list of eligibles for that position.

In an opinion to the Fire Commissioner under date of October 13, 1925 (Opinions of Corporation Counsel, 1925-1926), we had occasion to say that

"The only power that exists to permanently retire or discharge a fireman who is in the civil service of the City is that given to the Civil Service Commission by section 12 of the Civil Service Act above quoted, to be exercised only in the manner therein stated. Written charges of permanent physical or mental disability must be preferred, and an opportunity afforded the fireman to be heard in his own defense."

Mr. Kerr was not discharged by the Civil Service Commission on charges of permanent disability, and therefore no vacancy occurred on that account. There is but one other way in which such a vacancy might occur in a Civil Service position that will warrant the certification and appointment of one permanently to fill such position, and that arises under Rule VIII, sections 3 and 4 of the Civil Service Commission, when the Civil Service employee takes a leave of absence. We do not understand that Mr. Kerr

in this case applied for and was granted leave of absence on account of his disability, and therefore the filling of his position was not authorized on that account.

The decision in this case must be reached upon a construction of section 9 of the Firemen's Pension Act (Ca-hill's Stat. 1923, par. 950, p. 497), which provides as follows:

"If any fireman of any such city while on active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board (of trustees) shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in such service at the date of his retirement * * *."

There is nothing in this section 9 of the Firemen's Pension Fund Act as a whole affecting a fireman who "shall become and be so physically or mentally disabled as to render necessary his retirement from actual service," that empowers the Board of Trustees of Pensions, the City Physician or the Fire Commissioner, or all of them, to discharge (retire) a fireman from the department. The trustees can only suspend temporarily, and the same section 9 provides that

"If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal, or *chief of the department of such city, who shall thereupon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement.*"

The lines we have italicised plainly prescribe the duty and procedure of the Fire Commissioner in this case,

and further support the proposition that no such vacancy existed in this position of Chief of Battalion as authorized the certification and appointment of another *permanently* to the position. Said section 9 clearly provides that such positions shall be vacant only temporarily, during the disability of such fireman and until he is restored to his position by order of the Board of Trustees of the Pension Fund, which order, in this case, has been served.

The only legal course to pursue in this case, therefore, is to reinstate Mr. Kerr,—that is to “order the reinstatement of such fireman in active service in the same rank, or grade that such fireman held at the time of his retirement,” and to restore to the eligible list for reinstatement in the position of Battalion Chief, the eligible who has been acting during the disability of the regular holder of the position, and, to reinstate him in his former position of Captain. Formal report of this action should be made by the Fire Commissioner to the Civil Service Commission.

(No. 6029—June 9, 1927—F. J. C.)

1 WATER RATES, ANNEXED TERRITORY.

The ordinance regulating water rates and water accounts in force in the City of Chicago at the time of annexation of new territory extends to such territory.

2 ORDINANCES, ANNEXED TERRITORY.

Ordinances which are in force and effect in the City of Chicago are in force and effect in a duly annexed territory without express Council action to give them that application.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter of June 1st to this office, together with the copy of letter to you from Mr. Joseph Ward, Superintendent of Water, has been received by this office.

Mr. Ward's letter makes inquiry with reference to certain permits that were issued to master plumbers in Mount Greenwood and as to the manner in which he shall proceed in administering the ordinances of the City of Chicago as they apply to the Village of Mount Greenwood.

The Village of Mount Greenwood at a very recent election was annexed to the City of Chicago and is now a part of the 19th Ward. The situation as far as it affects Mount Greenwood as annexed territory is no different than any other territory which has been annexed to the City of Chicago.

The statute is silent as to the effect of ordinances in force in the City of Chicago at the time territory is annexed to the City, except in so far as it might have application as to the rights of a part of a village which might be annexed to the City of Chicago and that part of the village not annexed.

You can safely assume that every ordinance that was in force and effect in the City of Chicago at the time the Village of Mount Greenwood was annexed is now in force and effect in the territory annexed in the same manner and in the same force as they were in effect in the City of Chicago prior to annexation. In the case of *McGurn v. Board of Education*, reported in 133 Ill. page 122, the court in its opinion, page 131, says:

“By becoming a part of the municipality it (that is to say, annexed territory) is *ipso facto* brought under and made subject to all the laws by which the municipality itself is governed. Those laws extend over and apply to it *ex proprio vigore* and do not require express legislative action to give them such application. Here the instant the territory in question became annexed to Chicago, it became a constituent part of the city, and from that instant became subject to the same laws, the same municipal organization, and the same policy which the statutes in force had already

provided for the government of the city and its institutions.”

Likewise, the Supreme Court of our State in the case of *People ex rel. City of Chicago v. Chicago Telephone Company*, 220 Ill. page 238, at page 249, said :

“The ordinances of the city extended over the annexed territory immediately upon annexation (*Illinois Central Railroad Co. v. City of Chicago*, 176 U. S. 646), and the limitations of the ordinance applied to the annexed territory. The question in this case is the same as the one involved in the case of *Indiana Railway Co. v. Hoffman*, 160 Ind. 601, 69 N. E. Rep. 399, where it was held that a provision for transfers applied to the territory annexed to the city after the contract was made, and on an interurban line on which the defendant had been entitled to charge an additional fare before the annexation of the territory.”

We are therefore of the opinion that the ordinances relative to water rates and water accounts in force at the time of annexation, and in force now, have application to the Village of Mount Greenwood, and that such accounts and such rates should be enforced and made in the same manner as they are made in any other part of the territory of the City of Chicago over which the provisions of these ordinances govern.

(No. 6030—June 13, 1927—J. G. D. et al.)

1 STOCK QUOTATION ORDINANCE, LIABILITY.

Upon the acceptance of an ordinance granting to the Stock Quotation Telegraph Company the right to install electric wires to carry out certain privileges in the absence of fixed annual compensation, the grantee becomes obligated to carry out the provisions of the ordinance until the ordinance is either repealed or the Company is legally dissolved and the compensation liquidated.

2 ORDINANCE GRANTING PERMIT, REPEAL.

The failure to repeal an ordinance which grants privileges to a corporation does not continue the obligations assumed under the ordinance where the corporate grantee has been duly dissolved, its charter surrendered, all rights and privileges under the ordinance has been relinquished and notice thereof given to the City.

Hon. Charles C. Fitzmorris, City Comptroller:

There have been referred to us your correspondence and files in the matter of the City's claim against the Stock Quotation Telegraph Company of Illinois (Chicago News Bureau) for the compensation alleged to be due the City for the years 1924, 1925 and 1926 under the ordinance grant of the City Council to said Telegraph Company under date of June 15, 1914, which ordinance appears in the Journal of the Proceedings of the City Council of that date on pages 805 to 809, both inclusive.

This ordinance authorized the Stock Quotation Telegraph Company to install certain lines of electrical wires, etc., for the purpose of carrying out the privileges granted to it. Section 9 of this ordinance provides that said company shall not at any time lease, sell or dispose of its property rights or franchises to any person or corporation engaged in the same or similar business without the consent of the City, and further provides that the company shall not at any time sell, lease, dispose of or transfer the authority, permission, privileges or rights hereby granted

without the express consent of the City Council. Section 11 of the ordinance provides, "This ordinance shall take effect and be in force from and after its passage; provided that unless the written acceptance and bond shall be delivered as provided herein within thirty (30) days from the passage hereof, this ordinance shall become null and void, and all rights and privileges herein granted shall cease and determine."

The facts here disclosed are as follows: Written acceptance and bond were delivered by the Telegraph Company and approved by the City on June 22, 1914. The bond is executed in the name and corporate seal of the Stock Quotation Telegraph Company of Illinois, by William M. Klein, with Chicago Bonding & Surety Company as surety. The records disclose that this company has paid the compensation annually due by the terms of said ordinance for the years from 1915 to 1923, both inclusive; and that this company for itself, or by its permission, the Chicago News Bureau, has operated under and by virtue of said ordinance during all this time and also throughout the year 1924. No compensation having been paid by either of these companies for the years 1924, 1925 and 1926, the City has made demand upon the Stock Quotation Telegraph Company for such unpaid compensation in the sum of \$6,000.00.

Replying to the communication of the City Comptroller, directed to William M. Klein, President Stock Quotation Telegraph Company of Illinois, Mr. Klein, under date of February 8, 1927, said:

"Upon my return to Chicago I find your letter of January 19th in reference to compensation which you claim to be due from the Stock Quotation Telegraph Company of Illinois for the years 1924, 1925 and 1926. On November 24th, 1924, we served on the Honorable Francis X. Busch, Corporation Counsel, a notice stating that the Stock Quotation Telegraph Company of

Illinois had never in any way exercised the authority granted to it under and by virtue of the ordinance passed by the City Council on June 15th, 1914 (page 805 of the Journal of Proceedings of June 15, 1914). The notice also advised the City that the Stock Quotation Telegraph Co. of Illinois thereby surrenders to the City of Chicago any and all rights conferred upon it by said ordinance and releases and relinquishes any and all rights by virtue thereof.

"The Stock Quotation Telegraph Company of Illinois also surrendered its franchise to the Illinois Commerce Commission and said corporation was subsequently dissolved.

"In view of the foregoing, there is no compensation due to the City."

Subsequently a proposition in settlement of this claim was made to the Comptroller by West & Eckhart, lawyers, who represent themselves to be the attorneys for both the Stock Quotation Telegraph Company and the Chicago News Bureau. This proposition is in writing under date of May 27, 1927, and in part as follows:

"The City has now made claim for compensation under the Stock Quotation ordinance for the years 1924, 1925 and 1926 in the sum of \$6,000.00. Liability for such compensation is denied by the Stock Quotation Telegraph Company of Illinois and by the persons who were officers and stockholders of that Company prior to its dissolution. Liability is also denied by the Chicago News Bureau.

"Without in any way admitting any liability to the City and solely for the purpose of avoiding litigation, we hereby offer to pay to the City the sum of \$2,149.38, being three per cent of the gross earnings of the Chicago News Bureau for the year 1924, which sum is offered in full settlement of any claim of the City of Chicago under the said ordinance of June 15, 1914, against the said Stock Quotation Telegraph Company of Illinois and/or against the Chicago News Bureau."

Conceding as we may, that the Stock Quotation Telegraph Company of Illinois legally effected its dissolution

and surrendered its franchise rights and privileges which it acquired by the ordinance of June 15, 1914, that company could not thereby absolve itself from liability under that ordinance for the compensation due the City at the time of such dissolution,—that is, for the compensation unpaid for the year 1924. It is quite immaterial and is not an operative fact in the law of this case that, after having permitted the Chicago News Bureau to operate under the ordinance in its stead and after having paid the compensation on the business of said company during all the years from 1915 to 1923, inclusive, that “the Stock Quotation Telegraph Company never in any way exercised the authority granted to it under and by virtue of that ordinance,” for the Company, by accepting that ordinance and filing its bond thereunder, became bound as by contract to carry out its provisions until the ordinance was either repealed or the Company’s dissolution was legally effected. And the Company, having permitted the use of the franchise and privileges by the Chicago News Bureau and having authorized and approved such use by paying the compensation on the “earnings of the Chicago News Bureau,” is just as liable for this compensation as if it had exercised such rights and privileges itself, for the ordinance provides:

“That the company shall not at any time sell, lease, dispose of or transfer the authority, *permission*, privileges or rights hereby granted without the express consent of the City Council.”

It is not contended that such consent of the Council was obtained. The Stock Quotation Telegraph Company’s liability for the compensation for the year 1924, is clearly established, and this liability is fully covered by the Company’s present “offer to pay to the City the sum of \$2,149.38, being three per cent of the gross earnings of the Chicago News Bureau for the year 1924.”

This offer may be accepted in full discharge of any liability of the Stock Quotation Telegraph Company of Illinois to the City of Chicago under said ordinance of June 15, 1914, to this date, for its dissolution as a company, the surrender of its charter and the relinquishment and notice thereof to the City of all its rights and privileges under the ordinance, and its actual cessation of operation for itself or in behalf of the Chicago News Bureau, terminated at that time all its future obligations and liabilities to the City, notwithstanding the City Council may have neglected to repeal such ordinance.

We are also of the opinion that such offer may be accepted in full discharge of any liability of the Chicago News Bureau to the City of Chicago *under said ordinance*, just as for previous years the annual payment of compensation by the Stock Quotation Telegraph Company was accepted in satisfaction of the compensation due.

The offer here made, however, cannot be accepted as a concession to the Chicago News Bureau of the contention made in the letter of proposal "that it does not require a franchise from the City for the transaction of its business."

The acceptance of the offer here made must therefore leave open for future determination the question of the necessity of the Chicago News Bureau to obtain a franchise, license or permit from the City Council to conduct its business in the City of Chicago, and also leave open to settlement between the City and the Chicago News Bureau the liability of said Bureau for failure to comply with chapter LXXXI, page 1052, of the Chicago Municipal Code of 1922, on the subject of Telegraphs, Telephones and Tickers, and the general laws and ordinances governing the conduct of such business and the operations of such companies in the City of Chicago.

We believe that the offer here made was not intended to and does not involve the compromise or disposition of the legal status, or the rights and obligations existing between the City of Chicago and the Chicago News Bureau at the present date or for the years 1925 and 1926, since the dissolution of the Stock Quotation Telegraph Company except under the Ordinance of June 14, 1914. We do not, therefore, offer any opinion in this matter. If, however, the present offer is made with an insistence that it shall settle the status and obligation of the Chicago News Bureau for the years 1925 and 1926, and since the discontinuance of its relations with the Stock Quotation Telegraph Company, this offer cannot be accepted at all.

We regard the question of the duty of the Chicago News Bureau to procure a franchise, lease or permit to operate in the City and its failure to do so, as a matter entirely independent of the liabilities of either or both companies under the ordinance in question.

Whether settlement is made or not on the basis of this opinion, we shall be glad upon request of the City Comptroller or upon official direction to do so, to submit our opinion in support of our contention that the Chicago News Bureau cannot lawfully operate in the City without franchise, license or permit.

(No. 6031—June 13, 1927—F. J. V.)

1 ORDINANCES, SALE OF DRESSES.

An ordinance for the prevention of carrying diseases through the sale of dresses is promotive of public health and is valid if made to apply to all female persons alike and including wholesale as well as retail dealers.

2 ORDINANCES, POLICE POWER.

An ordinance passed in pursuance of the police power must have some relation to public health, welfare and safety and must be within constitutional limits.

3 POLICE POWER DEFINED.

The police power is that inherent and plenary authority in the state or a municipality which enables it to regulate or prohibit all things that are hurtful to the public health, safety and welfare.

4 MUNICIPAL CODE OF 1922.

Section 1824A as proposed will be valid if made applicable to all female persons alike and to include wholesale as well as retail dealers, it being designed to prevent the carrying of disease through the sale of dresses.

Hon. Terence F. Moran, Chairman, Committee on Public Health:

There has been submitted to us in your behalf by Hon. Patrick Sheridan Smith, the City Clerk, the following copy of an ordinance, with request that we render an opinion on its validity. The ordinance was passed by the Council May 18, 1927, reconsidered at the next meeting, May 25th, and referred to your committee.

The ordinance submitted has been introduced as an amendment to the general ordinance for the creation of the Department of Health and applies particularly to article VII thereof, which has to do with Contagious and Epidemic Diseases (Chicago Municipal Code of 1922, pp. 536, 543, 545). The proposed ordinance is as follows:

“It shall be unlawful for any person, firm or corporation engaged in the retail merchandising busi-

ness to sell or offer for sale any dress, garment or wearing apparel to adult female persons, where any such garment is to be tried on by the prospective purchaser, unless they first cover the upper portion of the body with a paper of sanitary covering which shall be impervious to perspiration under the arm pits, and where such dresses, garments or wearing apparel come into close contact with the skin and may thereafter be intended for sale to other such persons.

"Such protective covering shall not again be used by any other person without first having been disinfected by a process approved by the Commissioner of Health.

"Any person, firm or corporation violating the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

This ordinance is an exercise of police power, one of the three great powers inherent in every government; a power which, by delegation from the State, is lodged in the municipality. The police power is variously defined by the law-writers and the courts, but the definition most apt in application here is taken from an early opinion of our State Supreme Court:

"It may be said to be that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety (health) and welfare of society. It may be exercised to control the use of property of corporations as well as of private persons." *Lake View v. Rose Hill Cem. Co.*, 90 Ill. 191, 194.

In another case the Court has said:

"The Legislature (Council) has the same authority over the theater business as over any other lawful private business, and no more. Besides the requirement of a license, it may interfere with and regulate the business to the extent that the public health, safety, morality, comfort and general welfare require." *Peo-*

ple v. Steele, 231 Ill. 240, 344; *City of Chicago v. Gunning System*, 214 Ill. 628; *Lakeview v. Rosehill Cem. Co.*, *supra*.

The general limitations upon the police power exercise are also aptly stated in the case of *Richie v. People*, 155 Ill. 98, 110, as follows:

“Legislative acts (city ordinances) passed in pursuance of (the police power) must not be in conflict with the constitution and must have some relation to the ends sought to be accomplished,—that is to say, to the comfort, welfare and safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare and safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation when it is not such in fact; and where such an act takes the property of the citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society.”

In view of the general principles stated in the foregoing cases, we are of the opinion that the ordinance here submitted embodies a legitimate end for the exercise of the police power, namely, the preservation of the public health. Such an ordinance is clearly within the power of the Council to adopt, and, if properly drafted, will not involve any conflict with constitutional law. As indicated in the opinion of the case last cited, it is for the Council to determine and for us in our opinion to consider whether the ordinance is really an appropriate measure for the promotion of the public health and whether its provisions are reasonably adapted to that end.

The proposed new section, 1824A, has for its express purpose “Prevention of carrying diseases in the sale of dresses.” Its first provision, as stated, is that “It shall

be unlawful for any person, firm or corporation engaged in the retail merchandising business to sell or offer for sale, any dress," etc.

This is open to the serious objection that it is made to apply only to those who are "*engaged in the retail merchandising business*," and therefore discriminates against them and in favor of all other persons, firms and corporations not so engaged, but who are left to sell or offer for sale such dresses, etc., free from the exactions of the ordinance. This ordinance would not apply to those who are engaged solely in the wholesale merchandising business; those who are not engaged in either the wholesale or retail merchandising business; those who are for the time engaged in the exclusive sale of dresses but not necessarily in the merchandising business; those who are dressmakers, seamstresses, peddlers or transient salesmen.

This provision makes the ordinance invalid under the decision in the leading case of *City of Chicago v. Netcher*, 183 Ill. 104, where a similar provision, namely, "It shall be unlawful for any person, firm or corporation doing business in the city, *where dry goods, clothing, jewelry and drugs are sold*, to have exposed for sale," etc., was condemned as an invasion of the constitutionally guaranteed personal and property rights of the citizens. The court said, "It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case."

This objection may be obviated by striking out the clause, "*engaged in the retail merchandising business*," and the ordinance would then apply alike to all persons, firms and corporations engaged in sales, etc.

The limitation of such sales "*to adult female persons*" might be open to the same objection. At any rate, the declared general purpose of the ordinance would much better be met by providing for sales to ladies and misses over a stated age, if children are to be excluded, or to all persons of the female sex, which would include children.

We would not consider the inclusion of males in the case except for the statement in the City Clerk's letter that in the deliberation on the proposed ordinance it was suggested "that it might be necessary to include male persons in order to make it legal." We think it sufficient to say in this connection, that the courts take judicial notice that men do not wear dresses.

May we not note that the practice of sending dresses, etc., on approval for sale or return, is not provided for in the ordinance? Although not a necessary provision to a valid ordinance, it comes clearly within the scope of this ordinance and its expressed purpose.

We believe our opinion sufficiently covers the law and carries such suggestions as might with propriety be made to the Council in the matter of amendments to meet objections to the ordinance in its present form.

(No. 6032—June 14, 1927—F. J. C.)

DAMAGE TO CITY PROPERTY, LIABILITY.

The owner of an automobile as well as the person operating the same are both liable for causing damage to City property through the negligent operation of an automobile.

Hon. Michael J. Kennedy, Commissioner of Gas and Electricity:

Your letter of June 10, 1927, with reference to Warrant for Collection N-256, against the Hertz Drivurselself Company, for repairs to electric light equipment on 77th street near St. Lawrence avenue, has been received by this office.

We understand from your letter that an automobile driven by Iven Johnson, 7213 Evans avenue, and owned by the Hertz Company was responsible for the damage to the post.

The City, in its corporate capacity, has a right to sue any person who negligently injures or damages property belonging to the City. The Hertz people are the owners of these cars and rent them to private individuals for the use of the individual. There can be no doubt that the Hertz Company assumes all responsibility for the proper use of the car so rented, and that the person operating the car assumes all the responsibility for the proper operation of the same.

It is our opinion that both the company and the person renting the car are liable where they negligently damage the property of the city.

The customary procedure in cases of this character, where persons named in a warrant for collection disclaim liability for the item in the warrant, is for the department issuing the warrant to turn the same over to this department, where, if the facts warrant it, this department

will then proceed to enforce the demands by bringing suit against the persons named in the warrant.

The corporate power of the City is fixed by section 10 of article I of chapter XXIV of the Revised Statutes of Illinois, which provides:

“Cities organized under this Act shall be bodies politic and corporate, under the name and style of ‘City of (name),’ and under such name may sue and be sued, contract and be contracted with, acquire and hold real and personal property for corporate purposes, have a common seal, and change the same at pleasure, and exercise all the powers hereinafter conferred.”

(No. 6033—June 16, 1927—F. J. V.)

ANNEXED TERRITORY, SALARIES.

Patrolmen and firemen in territory annexed to the City receive the same pay as is provided for similar classes of City employees.

Hon. Michael Hughes, Superintendent of Police:

We have your letter of the 7th instant with enclosure of report of Deputy Superintendent R. J. McDowell in the matter of salaries to be paid to the three patrolmen who have just become patrolmen of the City of Chicago through the annexation of Mount Greenwood. You ask for “an opinion as to what salary should be paid during the month of May to Patrolmen John J. Hraha, Edward J. Hall and Charles Kerfin, the new patrolmen.”

The status of these men is founded upon section 402 of chapter 24, page 281, Smith-Hurd Statutes, which provides that:

“All patrolmen and firemen lawfully in the employ of any city, village or incorporated town, the whole

of which may be annexed to another, as provided in this act, shall be transferred to and become a part of the police and fire department force of such city, village or incorporated town."

By virtue of this statute the new patrolmen are entitled to the same salary and compensation as is provided by the City Council for Chicago policemen who originally enter the police service of the City of Chicago. The salary of these men must, therefore, be determined by the Annual Appropriation Ordinance of the City of Chicago for the year 1927. By this ordinance it is provided that the salary of patrolmen during the first year of service shall be \$1,990.00; for their second year of service \$2,110.00 and for the third year and thereafter \$2,350.00. Based upon the statement of these patrolmen made at the time of their transfer, John J. Hraha had served six years and Charles Kerfin served eleven years and, therefore, each is entitled to the maximum salary paid to Chicago patrolmen, viz.: \$2,350.00. Edward J. Hall having served but four months is entitled to the salary paid to Chicago policemen for their first year, viz., \$1,990.00.

If the salaries due these men for the month of May have not been placed and certified on the regular payroll for the month of May, a special or supplemental payroll should be made and certified in the regular way and payment of their salaries should be based thereon.

These men would also be entitled to the increased salary appropriation which is to take effect July 1st.

(No. 6035—June 20, 1927—G. F. M.)

CIVIL SERVICE, STATUS OF EMPLOYEE, RANK OR STAR,
CORRECTION.

The rank shown upon the records of the Civil Service Commission and not the rank assumed by a civil service employee or that given him upon the pay-roll determines the status of such employee; and in case of a police officer resigning, the star or rank notation written by him on his resignation is merely for identification and if incorrect may be changed thereon by the Police Department or the Civil Service Commission to conform to the records.

Hon. Michael Hughes, Superintendent of Police:

Complying with your request for an opinion in the matter of George J. Oakey, the following is submitted:

I am informed by the Assistant Secretary of the Civil Service Commission that George J. Oakey is on the civil service list in the rank of patrolman, and that the Commission does not recognize as a civil service position, employment in the capacity of temporary sergeant or sergeant by temporary appointment. Under these circumstances, the resignation of Mr. Oakey as a member of the Police Department, would necessarily show on the records of the Civil Service Commission as creating a vacancy in the rank of "patrolman" so far as concerns civil service positions; and, as Mr. Oakey was acting as temporary sergeant in the police department, his resignation would necessarily leave a vacancy in the police department in the number of sergeants of police to be filled by temporary appointment subject to the approval of the Civil Service Commission.

The mere fact that a civil service employee writes upon his resignation over the word "rank," the title of an office which he does not hold by virtue of a civil service examination, does not in any way affect his right to resign from the police department, nor does it affect in any way the

duty of the Civil Service Commission to accept the resignation of that employee, since the records of the Civil Service Commission would simply show that the employee resigned and necessarily must have resigned with the rank on their records which their records show. If a patrolman in his resignation writes "sergeant" as his rank, or "lieutenant" as his rank, or "captain," it is immaterial since a civil service employee can only resign, so far as concerns the Civil Service Commission, from the rank which he holds on the records of the Civil Service Commission. If a civil service employee in resigning places an incorrect rank on his resignation, it is only necessary for your office or the Civil Service Commission to change the resignation to show the proper rank. The word "star" and the word "rank" on the resignation are mere identifying data, having no necessary or essential connection with the resignation, as a resignation, from membership in the police department. If a policeman in filling out his resignation, gave the wrong Star Number, it would seem absurd to hold that the police department or the Civil Service Commission could not correct the Star Number to show the actual fact or the correct number; so also, if a policeman in filling out his resignation, gave the wrong rank, it is equally within the power of the police department or the Civil Service Commission to correct that item to conform to the facts as shown on the Civil Service Records.

I am informed that the Civil Service records show that Mr. Oakey was being paid a sergeant's salary, and that the payrolls of the police department so showing were regularly approved by the Civil Service Commission. Since the words "star" and "rank" on his resignation are mere items of identification, the proper entry for the item "rank" would be "patrolman, acting as sergeant by tem-

porary appointment," which would certainly identify the Oakey who was resigning and distinguish him from any other man of the same name in the department, particularly when taken in conjunction with his correct "star" number, and would state the facts of his status as I understand it was.

I am of the opinion that the resignation of Mr. Oakey should be corrected so far as concerns the item "rank" by your office or the Civil Service office writing on the said resignation the words "patrolman, acting as sergeant by temporary appointment;" or any notation as to "rank" could be left off altogether without doing any harm to either the Civil Service records or to Mr. Oakey, as Mr. Oakey's resignation reads—"I hereby tender my resignation as a member of the Police Department of the City of Chicago," and such resignation is effective whether any notation as to rank or star number is on the written resignation or not.

I am of the further opinion, that a man's rank, so far as concerns the Civil Service Commission, is fixed by the records of that Commission, no matter what rank the employee may claim to hold, unless and until the records of the Civil Service Commission are changed pursuant to an order of court.

(No. 6036—June 22, 1927—G. F. M.)

POLICE BENEFITS, ANNEXED TERRITORY.

Policemen in the employ of a village at the time of the annexation of its territory to the City of Chicago become part of the City's Police Department and are entitled to the same disability benefits subsequent to such annexation as are any other City policemen.

Hon. Michael Hughes, Superintendent of Police:

Replying to your request for an opinion in the matter of Charles Kerfin, the following is submitted:

The documents submitted by you are to the effect that Charles Kerfin was in the service of the Mount Greenwood, Ill., Police Department, and came into the Chicago Police Department when the Village of Mount Greenwood was annexed.

Mount Greenwood voted to become annexed to the City of Chicago in April, 1926; Chicago voted to annex Mount Greenwood in February, 1927; and the Council proceedings for May 2, 1927, show the passage of an ordinance making such annexation a matter of record.

Section 42 of the Policemen's Annuity and Benefit Fund Act provides as follows:

"Whenever any territory shall be annexed to such City, any policeman then employed as a policeman in such annexed territory, who shall be employed by such City on the date of the annexation of such territory as a policeman of such City shall automatically come under the provisions of this Act and any term of service rendered in such territory by such policeman shall be considered, for the purpose of this Act, as such a term of service rendered in such City.

"Any such policeman shall be treated in every respect as of the date of such annexation shall come into effect in the manner specified in this Act concerning present employees of such City on the first day of the month of January of the first year after the year in which this Act shall come into force and effect in such City."

I am of the opinion that if Mr. Kerfin was in the employ of the Village of Mount Greenwood on the date Chicago voted to annex Mount Greenwood, namely, February 22, 1927, and was employed by the City of Chicago on the date of such annexation as a policeman of the City of Chicago, then and in that event Mr. Kerfin became, was and is now entitled to the benefits provided for in the Policemen's Annuity and Benefit Fund Act, and would

therefore, be entitled to receive disability benefit during any period or periods of his disability, for which he did not receive or have a right to receive any part of his salary subsequent to such annexation.

(No. 6037—June 22, 1927—F. J. C.)

STREETS AND ALLEYS, OPERATION OF VAULT, COMPENSATION.

The City is entitled to compensation for the use and operation of a vault under an alley where no dedication of the alley is shown and there is no substantial interference with the easement which the public has in the alley.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter of the 11th instant, together with the copy of the letter from Albert H. Veeder. You make inquiry as to the correctness of the position taken by Mr. Veeder in regard to the payment of compensation referred to in his letter.

We have examined the plats in the map department of the City and find under note "A" appearing on the plat of the property in question that the alley in question was "extended by the City Council" to include the part of the alley which runs contiguous to the property of the Metropole Hotel. From information which we are able to obtain from the Map Department, the Board of Local Improvements and other departments we have been unable to ascertain the exact time or condition under which the City Council acted at the time it extended the alley, but it is apparent from such records that this particular portion of the alley was acquired by the City Council and not by dedication.

The rule of law made in the *Sears Case*, 247 Ill. 204, is substantially as stated in Mr. Veeder's letter. The court in that case said at pages 216 and 217:

"In cases, however, where the municipality only has an easement in its streets and the fee remains in the abutting lot owners, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires. A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use. The law provides a method by which the owner of real estate which is platted into town lots may, if he so desires, convey a determinable fee to the municipality by the execution of a properly acknowledged and recorded plat. When this course is adopted, the owner, having the power to make any disposition of his property he sees fit, can invest the municipality with the fee. If such statutory plat is made and recorded, all persons who subsequently purchase lots according to such plat will be presumed to have notice that they acquire no rights in the public streets except those already referred to. On the other hand, one buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge of the fact that a conveyance of the abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public. (3 Kent's Com., 12th Ed., 433; *Hurley v. Chandler*, 6 Mass. 454; *Tucker v. Tower*, 26 *id.* 108.) It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in a street, subject only to the easement of the public, must pay the city for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement."

The ordinance of February 21, 1926, was passed by the Council and gave the Metropole Company the right to use a vault already in existence. It appears from the records that since the passage of this ordinance the property has been transferred and the new owner refuses to pay compensation under the ordinance.

It is our opinion that the City cannot compel the payment of this compensation unless it can be shown that the use and operation of this vault in some substantial way interferes with the easement which the public has in the alley.

(No. 6038—June 22, 1927—F. J. V.)

SALARY AND WAGES, PAYMENT IN GOOD FAITH, RECOVERY BACK.

Salary paid in good faith to a *de facto* officer during the time he filled the position made vacant by a *de jure* officer cannot be recovered back from a municipality; and good faith on behalf of the municipality is shown where payment of the salary is made to a person regularly appointed to fill the vacancy created upon written charges made against a Civil Service employee and a hearing had before the Civil Service Commission resulting in a removal or discharge from Civil Service.

(In the Supreme Court it was held that until a public employee is adjudged an officer *de jure*, payment to a *de facto* employee is lawful, and does not subject the municipality to double payment for the same services. 327 Ill. 443, 447.)

Hon. John S. Clark, Chairman, Committee on Finance:

On June 1, 1925, there was filed with your Committee the claim of Joseph A. Thoney, for the total sum of \$10,167.89, being \$7,985.83 as principal and \$2,182.06 as interest, alleged to be due the claimant as back salary for the time he was kept out of his civil service position of Inspector of Moral Conditions of the City of Chicago.

This statement of claim together with exhibits thereto attached, was submitted to the Corporation Counsel, and on July 23, 1926, in a communication to the Committee the advice was given that action on this claim be deferred until the final decision should be rendered in the higher courts in the similar case of Charles J. O'Connor against City of Chicago which is now pending and undecided, in the Supreme Court. How soon this decision may be made we do not know. We are still of the opinion that the claim of Mr. Thoney to any judgment or right of recovery against the City in any sum whatever will be directly and squarely determined by the forthcoming decision of the Supreme Court in the O'Connor case.

However, we have been urged to submit an opinion at this time and in deference to this urgent request we respectfully submit the following:

Mr. Thoney and M. L. Funkhouser were tried at the same time on charges before the Civil Service Commission and both were removed from their respective positions. Both instituted mandamus proceedings in the Circuit Court *not for salary, but for reinstatement in their positions*. The Circuit Court decided adversely to them. In the Circuit Court, it was agreed by counsel for Mr. Thoney and the City that the decisions to be rendered in the trial court and by the courts on appeal should also govern the claimant's case and the same orders be entered therein as in the Funkhouser case.

The decision of the Circuit Court in the latter case, which sustained the Civil Service Commission's order of removal was reversed by the Appellate Court and this reversal was affirmed by the Supreme Court. (*Funkhouser v. Coffin*, 301 Ill. 257.) By virtue of this decision and the agreement of counsel made in the Thoney case this claim-

ant was reinstated in his position and this is all he is entitled to under said agreement.

Here we note that in the claimant's statement he stresses the agreement in his mandamus action for reinstatement as in some way lending support to his present claim for salary. In the Funkhouser case, as well as the Thoney case, the issue as to salary was not involved so the agreement of the Assistants Corporation Counsel that the Thoney case should be governed by the Funkhouser decision entitled Mr. Thoney to reinstatement in his position but in no way gives any support to his claim for back salary. Mr. Funkhouser himself did not contend that he was entitled to back salary under the decision of the Supreme Court in 301 Ill. 257, but thereafter instituted another action to recover salary. In fact Funkhouser brought two actions, one against the city and another against Frazier, who was appointed to Funkhouser's position and for part of the time drew the salary. From a judgment against Frazier he appealed and the Appellate Court after reviewing the history of the case as above outlined, and citing the decision in *Funkhouser v. Coffin*, *supra*, presents the issues and law of the case as follows:

"Thereupon on January 21, 1922, appellee began two suits in assumpsit to recover the salary of the position, one against the City of Chicago for the entire salary accruing between May 24, 1918, the date of his suspension, and December 31, 1920, when the abolition of the position was deemed to take effect, and the present action against appellant Frazier, for that portion of the salary paid to the latter by the City of Chicago during a part of that period. In the former suit, which came to trial first, he obtained a judgment for \$6,570.72, which the record tends to show was for salary appropriated for the period when not paid to Frazier, and in the latter, a judgment for \$3,460.88, that portion of the salary paid to Frazier with interest.

“The suit against the City was brought upon the theory that plaintiff was a *de jure* officer or employee, and as such entitled to the entire salary appurtenant to the position. In recognition of the principle that recovery cannot be had from a municipality where the salary was paid in good faith to a *de facto* officer (*People v. Schmidt*, 281 Ill. 211, 213), plaintiff based his action against the City, so far as he sought to recover the salary for that period during which appellant held the position and received the salary, on the theory that the payment of salary to him during such period was not made in good faith. Whether it was paid in bad faith was the main issue in the case so far as it related to that part of the salary paid to appellant. It had no bearing upon that portion of the salary claimed that was not paid to appellant, and it is for the latter only that the record indicates recovery was had.” *Funkhouser v. Frazier*, 234 Ill. App. 387.

We think this case of itself is authority against the claim filed herein or any right of action that might be brought to recover the back salary here demanded. It will be observed that Mr. Funkhouser brought one of his actions against the City based on two theories of right of recovery, namely: (1) for the salary not paid to Frazier or others appointed to and filling his position during the time he was kept out; (2) for the salary paid to Frazier during part of the time he was kept out on the theory *that such salary was not paid to Frazier by the City in good faith* Funkhouser recovered against the City only that salary that had not been paid to Frazier, and that salary paid to Frazier, he was not permitted to recover.

During the time the claimant, Thoney, was kept out of his position, the salary was paid by the City to Hugh McCarthy, R. S. Jackson and Harry Hickstein, who had been regularly appointed to fill the vacancy created by due process of law upon written charges and a hearing had thereon before the Civil Service Commission under section

12 of the Civil Service Act. And on the strength of this proceeding and also the decision of the Circuit Court in Mr. Thoney's case which sustained the Civil Service Commission's record of discharge the City of Chicago, in perfect good faith, paid the salary of this position to these *de facto* appointees.

Just as Mr. Funkhouser was not allowed to recover from the City that part of the salary for his position that had been paid to Mr. Frazier, the *de facto* appointee, during the time he filled the position, so Mr. Thoney has no valid claim against the City, for in his case his position was filled by the *de facto* appointees above named and the salary paid to them. As said in the case of *Funkhouser, supra*,

"In recognition of the principle that recovery cannot be had from a municipality where the salary was paid in good faith to a *de facto* officer (*People v. Schmidt*, 281 Ill. 211, 213), plaintiff (Funkhouser) based his action against the city, so far as he sought to recover salary for that period during which appellant (Frazier) held the position, and received the salary, on the theory that the payment of salary to him during such period was not made in good faith."

Funkhouser lost this branch of his case against the City, but recovered judgment on the other action against Frazier for the salary paid to him. The case of the claimant, Mr. Thoney, is precisely like this branch of Mr. Funkhouser's case against the City and for the same reason he cannot recover from the City the salary paid to *de facto* appointees who filled the position.

A salary or compensation which has been paid in good faith to a *de facto* employee during the time the position was in his possession cannot be recovered again from the municipality by the *de jure* officer. *People ex rel. v. Schmidt*, 281 Ill. 211; *People ex rel. v. Burdette*, 283 Ill.

124, 126; *Bullis v. City of Chicago*, 235 Ill. 472, 480; *City of Chicago v. Luthardt*, 191 Ill. 516; *City of Chicago v. People ex rel.*, 210 Ill. 84, 93; *Kenyon v. City of Chicago*, 135 Ill. App. 227; *Kenneen v. Bradford*, 190 Ill. App. 289, affirmed in 267 Ill. 487; *McMahon v. County of Cook*, 210 Ill. App. 196; *Kennedy v. City of Chicago*, 220 Ill. 485, 504; *People ex rel. McDonald v. Thompson*, 316 Ill. 11.

A regular proceeding and order of discharge before the Civil Service Commission under section 12 of the Civil Service Act, although afterwards set aside by the courts, is sufficient to establish good faith in the filling of the vacancy thereby created and the payment of salary to others appointed to fill such vacancy. Opinions of Corporation Counsel, 1925-1926, page 434.

Vacancies created by the Civil Service Commission under section 12 of the Civil Service Act must be filled. There is no discretion in the matter but it is the mandatory duty of department heads to fill such vacancies, hence bad faith cannot be predicated on the filling of such vacancies and the payment of salaries to others. *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462; *People v. Schmidt*, 281 Ill. 211.

The Civil Service Commission is expressly empowered by law (Sec. 12 Civil Service Act) to try civil service employees and discharge them and the City of Chicago is no more liable to pay the salary the second time merely because of error committed by the Commission, than is the unsuccessful plaintiff in any *bona fide* litigation liable in damages to the defendant because he has failed in his action. This is elemental law. Moreover in the Funkhouser and the Thoney cases the records of the Civil Service Commission were not quashed by the higher court on the ground that the accused were not guilty of the charges preferred against them, but the records were

quashed solely upon the technical ground that they were legally defective for stating that "we find therefrom (the evidence heard) that the said M. L. C. Funkhouser is guilty as charged in the within and foregoing charge;" the Supreme Court saying: "It is manifest that the finding that appellee was guilty as charged is a mere conclusion of law. No fact was stated by which the court was able to see that that conclusion was true." *Funkhouser v. Coffin*, 301 Ill. 257, 261.

The same charges could have been refiled, another hearing had thereon and second finding of guilty entered and a sufficient legal record entry made thereon. *People ex rel. Aeberle v. City of Chicago*, Ill. App., No. 30630, March 29, 1926, First Div.

These points and authorities are presented to establish as a matter of law the good faith of the City of Chicago in the payment of salaries to *de facto* appointees in cases such as the claim of Mr. Thoney.

The Circuit Court in both the *Funkhouser* and *Thoney* cases found against them, holding that they were not legally entitled to the positions from which the Civil Service Commission discharged them. This judgment of the Circuit Court in these cases is full protection to the City in its payment of these salaries to others.

In the O'Connor case which is now in the Supreme Court awaiting decision we are contending that: "Where there is a judgment of a court that a *de facto* incumbent is entitled to an office, a municipality is protected in paying his salary, and is not liable to one who is entitled to the office by an Appellate Court decision which reverses the judgment of the lower court." *People v. Brennan* (N. Y. Sup. Ct., Spes. T.), 1 Abb. Pr. (N. S.) 184; *Bradley v. Georgetown*, 118 Ky. 735, Ann. Cas. 671; *Scott v. Crump*

(Mich.), 64 N. W. 1, 58 Am. St. Rep. 478; see *People ex rel. McDonald v. Thompson*, 316 Ill. 11, 12.

We are submitting with this opinion a copy of our brief in the Supreme Court in the O'Connor case, on account of which we have heretofore advised the Finance Committee to defer action on this claim.

As to the demand for \$2,184.06 interest on this claim, there is no legal basis whatever, even if there existed a legal claim for principal. The Circuit and the Superior Courts in the O'Connor and Hittle cases which are now pending in the Supreme Court sustained this contention. Interest can be collected either *ex contractu* or *ex lege*, and on the basis of the present claim no interest is collectible on either theory. The case of *Funkhouser v. Frazier*, *supra*, supports our proposition. The Appellate Court says that in his case against the City, Funkhouser "obtained a judgment for \$6,570.72, which the record tends to show was for *salary* appropriated for the period when not paid to Frazier, and in the latter (case against Frazier), a judgment for \$3,460.88, that portion of the *salary* paid to Frazier *with interest*." *Funkhouser v. Frazier*, 234 Ill. App. 387, 389.

We are of the opinion that unless the Supreme Court, in the pending O'Connor case shall modify the rule laid down in the Schmidt case, 281 Ill. 211, and frequently applied, viz., that recovery cannot be had from a municipality where salary was paid in good faith to a *de facto* officer, there can be no legal basis for the payment of the claim here presented or any part thereof.

(No. 6039—June 23, 1927—J. G. D.)

BUILDINGS, CONSTRUCTION, PERMIT.

The Commissioner of Buildings has a reasonable time, depending upon the circumstances in each case, within which to determine whether he will issue a permit which he has recalled because of a violation of the Building Ordinances.

Hon. Christian P. Paschen, Commissioner of Buildings:

Yours of June 23d to Honorable Samuel A. Ettelson, Corporation Counsel, in his absence, has been handed to me for consideration.

Section 430 of The Chicago Municipal Code of 1922 specifically provides that it shall be unlawful to proceed with "the erection, enlargement, alteration, repair or removal of any building, or of any structural part thereof, within the City, unless such permit shall have been obtained from the Commissioner of Buildings."

Section 406 gives to the Commissioner of Buildings power to stop the construction of any building or the making of any alterations or repairs thereon within the City when the work is being carried on "in violation of any ordinance."

After you have stopped such construction work because of the violation of the Building Ordinances for failure to take out the necessary permit, I would consider that you had a reasonable time within which to determine whether or not the permit should be issued. I think thirty days, or more, governed largely by the circumstances, would be a reasonable time.

You will note from section 959 that the penalty for violating the Building Ordinance is quite severe, namely:

"Any person, firm or corporation engaged in the business of contracting for masonry or mason work

or employing mason that shall fail to procure a license as herein provided for, or any person, firm or corporation that shall violate any of the provisions of this article, shall be fined not less than five dollars nor more than fifty dollars for each offense, and in addition to such penalty the license of any person, firm or corporation licensed hereunder may be revoked in the discretion of the Mayor."

(No. 6040—June 27, 1927—F. J. C.)

CITY COUNCIL, ORDERS, RECONSIDERATION.

A motion to reconsider an order of the City Council to be effective must be made at a meeting at which the order was passed, or at a subsequent regular meeting held immediately thereafter and must be acted upon.

Hon. Louis B. Anderson, Council Chambers:

Your request for an opinion as to the status of the order having reference to the fact that the Commissioner of Public Works be authorized to employ a head stenographer in his office at a salary of \$2,700.00 per annum in lieu of a principal stenographer at a salary of \$2,580.00 per annum has been received by us, and in reply thereto we desire to say that we have examined the Council Journal in order to determine exactly what the proceedings in reference to this matter show.

We find that on April 5th, 1923, the following order was passed:

"Ordered, That the Commissioner of Public Works be and he is hereby authorized to employ a head stenographer in his office at a salary of \$2,700.00 per annum in lieu of a principal stenographer at a salary of \$2,580.00 per annum, the difference in salary to be paid from salvage in the salary account of that office." Council Proceedings, p. 2356.

The proceeding then shows that all of the aldermen present voted for the passage of the order; that subsequently and prior to the next regular meeting said order was signed by Mayor Thompson; that under date of April 12, 1923, a request was made for certification by the Civil Service Commission, and under date of April 14th the Civil Service Commission certified three names from the promotional list existing for head stenographers; that under date of April 24, 1923, report of the promotion was made to the Civil Service Commission and the payroll was made up; and that in the Council Proceedings of April 16, 1923, at page 3 of the Proceedings, Alderman D. A. Horan moved to approve the printed record of the Proceedings of the regular meeting held Thursday, April 5, 1923, as submitted and signed by the City Clerk as the Journal of the Proceedings of said meeting and to dispense with the reading thereof. This motion prevailed. The order introduced by Alderman Coughlin on April 5, 1923, was included in this motion of Alderman Horan to approve such proceedings; and said order in so far as the record showed became effective and binding by reason of the motion of Alderman Horan.

It then appears that at the meeting of May 2, 1923, Council Proceedings, page 107, Alderman Woodhull moved to correct the Journal of the Proceedings of the City Council of April 5, 1923, by inserting therein after the line reading "Nays—None" (being the sixth line from the bottom of the page in the right hand column of page 2356) the following language:

"Subsequently Alderman Woodhull moved to reconsider the foregoing vote.

"The motion prevailed.

"Alderman Woodhull moved to refer said order to the Committee on Finance.

"The motion prevailed."

It will be seen from a reading of the Council Proceedings that at no time was there a vote taken on the motion to reconsider the order presented by Alderman Coughlin and passed at the meeting of April 5, 1923. All that the motion of Alderman Woodhull did in the premises was to correct the Journal by inserting the language "subsequently Alderman Woodhull moved to reconsider the foregoing vote." In other words, there was no vote taken on the motion to reconsider, but there was simply a motion to correct the records of the Proceedings of April 5, 1923, without in any way changing the status or effect of the order passed April 5, 1923. After making the motion to correct the records, Alderman Woodhull moved to refer said order to the Committee on Finance, which motion prevailed. The effect of this motion to refer would simply be to refer to the Finance Committee an order that was in full force and effect under the record as it was correctly preserved in the Journal.

We are therefore of the opinion from our examination of the records that at no time was there a direct motion made by any alderman to reconsider the vote taken on the passage of this ordinance on April 5, 1923, and the only effect of Alderman Woodhull's motion to correct the record was to show that a motion to reconsider might have been made, but was never acted upon by the City Council. This being the case, we are of the opinion that the person who was appointed to the office of head stenographer under the certification of the Civil Service Commission was entitled to act as head stenographer, and was entitled and is entitled to the full salary of \$2,700.00 per annum for so acting during all of the term under which this order has been in force and effect.

In addition to the above, we desire to call your attention to the fact that the rules of the Council provide, un-

der Rule 36 in force at the time of the passage of this ordinance, as follows:

“A vote or question may be reconsidered at any time during the same meeting or at the first regular meeting held thereafter. The motion for reconsideration having once been made and decided in the negative shall not be renewed nor shall a vote to reconsider be reconsidered.”

The motion to reconsider the order of April 5, 1923, could only be reconsidered under the terms of this rule. It would be necessary in order to make a motion to reconsider effective that the motion be made at the meeting at which the order was passed, or at the subsequent regular meeting held immediately thereafter. Nothing was done either at the meeting of April 5, 1923, nor at the meeting of April 16, 1923, on which date was held the next regular meeting. The fact that the rules had not been complied with would lend additional force to the fact that the order of April 5, 1923, is still effective and has never been reconsidered by the City Council.

(No. 6041—June 27, 1927—G. F. M.)

1 PENSIONS, BASIS FOR CALCULATION.

A policeman's annuity should be based upon the salary paid the annuitant at the time of his resignation from the service, although the annuitant occupies at the time a temporary position which is higher than his regular rank.

2 PENSIONS, CIVIL SERVICE LAWS.

The Civil Service Act is separate and distinct from the Pension Laws and is not binding upon the members of the Retirement Board in the administration of the Pension Laws.

Retirement Board, Policemen's Annuity Benefit Fund:

At a recent meeting of your Honorable Body, an opinion was requested on the pension application of George J. Oakey and the following is submitted:

George J. Oakey, a member of the Police Department of the City of Chicago, applied for a pension under section 55 of the Act based upon age of service. Mr. Oakey's rank on the records of the Civil Service Commission, was that of "Patrolman." At the time of his resignation from the Department and application for a pension, Mr. Oakey was holding the rank of "Sergeant" of Police by virtue of a temporary appointment and had held such rank for a period of one and one-half years prior to the date of his resignation, the said promotion having been granted to him in recognition of a distinct and creditable act of bravery.

Section 55 of the Policemen's Annuity and Benefit Fund Act provides, among other things, that any "present employee" who shall resign from the service after January 1, 1922, and after he shall have completed twenty or more years of service and who shall be fifty or more years of age at the time of his resignation and for whom the annuity provided in the Act shall be less than half of his salary "shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to 50% of the salary of such present employee as such salary shall be at the time of his resignation or discharge from the service."

If section 55 used the words "50% of the salary *attached to the rank* of such present employee" and if the Civil Service Act were binding upon your Honorable Body, then it might be contended that Mr. Oakey's Civil Service rank of Patrolman would fix the salary basis of his pension award. But section 55 says nothing about "rank" and the Supreme Court of Illinois has held in the case of *Stiles v. Board of Trustees*, 281 Ill. 636, at page 641, that a pension law is a separate law and has nothing to do with a Civil Service Law. Our Supreme Court has also held that the right to a pension depends entirely and altogether

upon the terms of the Act providing for such pension. Under these circumstances the only question before your Honorable Body is as to what is meant by the provision of section 55 which fixes the annuity at "50% of the salary as such salary shall be at the time of his resignation or discharge from the service."

It appears from the City's records that Mr. Oakey was paid a Sergeant's salary during the entire period of his service as Sergeant of Police by temporary appointment and that the several payrolls containing Mr. Oakey's name and the amount of his salary were approved by the Civil Service Commission; this approval necessarily recognized the validity of Mr. Oakey's appointment as being of the character of continuing sixty day appointments authorized by section 10 of the Civil Service Act. Had Mr. Oakey not been legally entitled to the pay of a Sergeant of Police, the Civil Service Commission would not have approved the payroll containing his name and salary; the Commission having so approved establishes the legality of the salary paid to Mr. Oakey as a Sergeant of Police by temporary appointment. The salary being paid to Mr. Oakey as such Sergeant at the time of his resignation was therefore, "the salary of such present employee as such salary shall be at the time of his resignation."

Upon the facts as presented to me, I am of the opinion that Mr. Oakey is entitled to be paid a pension, under section 55 of the Act, based upon the salary being paid to him as a temporary Sergeant of Police at the time of his resignation from the service.

The opinion heretofore rendered in this matter on December 15, 1926, (Corporation Counsel's Opinions, 1926-27, page 503), having been rendered upon an incomplete statement of facts, is hereby withdrawn.

(No. 6042—June 27, 1927—F. J. C.)

1 ELECTIONS, ANNEXATION, MAJORITY VOTE NECESSARY.

A proposition to annex territory to the City or municipality must receive a majority of all the votes cast at the election within the municipality in favor of annexation.

2 BELMONT HEIGHTS, ANNEXATION.

The proposition to annex Belmont Heights did not receive a majority of all the votes cast at the April election of 1927 and was therefore defeated.

Mr. Edward J. Freauf, 3511 No. 77th Avenue, Belmont Heights, Ill.:

Your letter to Mr. Ettelson of June 11, 1927, has been referred to me for attention. At my request you called at this office to give me certain information with reference to the question involved in your letter. When you called here you informed me that Belmont Heights is not an incorporated village and that the question of the annexation of Belmont Heights to the City of Chicago involved the annexation of unorganized territory contiguous to the City of Chicago.

I have made an examination of the records in the Board of Election Commissioner's office and find that the proposition to annex Belmont Heights to the City of Chicago was placed on the ballot voted at the election on April 5, 1927, held in the City of Chicago, and that this proposition was numbered 16 on the ballot. The vote on said proposition was Yes, 453,723, No, 130,920. There were approximately one million votes cast at this election in the City of Chicago.

You say that you had a conference with Mr. Hornstein in reference to this matter, and that he informed you that Belmont Heights was not annexed to the City of Chicago by reason of the fact that the vote Yes on the proposition

did not constitute a majority of all the votes cast at said election in favor of such annexation. I desire to call your attention to Callaghan's Illinois Statutes Annotated, volume 2, page 1375, chapter 24, under the heading of Part II in which appears an act entitled "An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," approved April 10, 1872, in force July 1, 1872. Section 1 of said Act provides as follows:

"That on petition, in writing, signed by a majority of the legal voters, and by a majority of the property owners in any territory contiguous to any city or incorporated village or town, and not embraced within its limits, the city council or board of trustees of said village, city or town (as the case may be) shall submit to a vote of the people of said city, village or town (as the case may be) at its next regular election or a special election to be called within sixty (60) days after said petition is presented, the question of the annexation of such proposed territory: *Provided, however,* that where the said petition shall be presented within ninety (90) days prior to a regular election no special election shall be called. In case the question of such annexation shall receive a majority of all the votes cast at said election in favor thereof, the city council or board of trustees of said city, village or town (as the case may be), shall, within ninety days thereof, by ordinance, annex such territory to such city, village or town, upon filing a copy of such ordinance, with an accurate map of the territory annexed (duly certified by the mayor of the city or president of the board of trustees of the village or town), in the office of the recorder of deeds in the county where the annexed territory is situated, and having the same recorded therein."

It will be noted that this section contains the language "in case the question of such annexation shall receive a majority of all the votes cast at said election in favor thereof, the city council or board of trustees of said city, vil-

lage or town (as the case may be) shall within ninety days thereof by ordinance annex such territory to such city," etc.

I am of the opinion that Mr. Hornstein correctly interpreted the provisions of this law and that Belmont Heights was not at that election annexed to the City of Chicago because a majority of the votes cast at that election were not cast in favor of annexation. I think that the statute makes it plain that it is meant that such proposition, in order to become effective, must receive a majority of all the votes cast by the electors in said city to make the annexation operative.

I am therefore of the opinion that such annexation was not accomplished by the vote of the election held in the City of Chicago on April 5, 1927.

(No. 6043—June 28, 1927—F. J. V.)

1 CONTRACTS, PROVISION IN CASE OF STRIKES, VALIDITY.

A provision in a contract between a coal company and a municipality providing for the supply of coal from other mines or places than those specifically enumerated in case of strikes based upon the difference in freight rates, is valid and enforceable.

2 CONTRACTS, WAIVER OF PROVISIONS, VALIDITY.

The waiving of a valid, beneficial provision in a contract between competent parties must be supported by valid consideration, or the waiver is inoperative.

3 CONTRACTS, CITY COUNCIL, POWER.

The City Council stands in the same position as any other contracting party, and may either grant or refuse to waive a provision affecting the other party to the contract.

Hon. John S. Clark, Chairman Committee on Finance:

There has been submitted to us for an opinion the files of your committee consisting (1) of a written application to

the Commissioner of Public Works of the Binkley Coal Company (to apply also in behalf of the Sterling-Midland Coal Company) to be relieved from certain provisions of their existing contracts with the City to supply coal for some of its institutions; (2) the official communication of the Honorable Richard W. Wolfe, Commissioner of Public Works, directed to your committee, requesting authority of the City Council to grant such request of the coal company; (3) the Finance Committee's copy of article VI, page 3 of coal specifications of said contract which are sought to be modified and waived; (4) copy of proposed order for passage by the Council covering the case authorizing such modification as requested.

Copies of these papers as above referred to are respectively as follows:

(1) REQUEST OF COAL COMPANY

"Replying further to your letter of April 22d, and to the inquiry of Mr. F. C. Martini as to how long it will be necessary to ship you Coal without giving you advance notice of specific origin of the Coal delivered, beg to advise that due to the existing strike of the Union Mines in the Coal Fields of Indiana and Illinois, we are unable to obtain a continuous supply of Coal from any one source, and are purchasing Coal to be delivered to the City from time to time wherever it can be obtained from different sources in Indiana and Illinois which are operating in spite of the strike.

"We do not know from time to time the origin of the Coal which we expect to deliver, and cannot give you advance notice. This condition will continue as long as the present strike of the Union Miners lasts. There is at present no definite information as to the duration of that strike—one guess is as good as another.

"In addition, the Coal that we purchase from time to time is purchased upon a delivered price to Chicago bearing various freight rates to Chicago—some

greater and some less than the rate under our contract with the City.

"We do not believe that the provisions of the contract, dealing with advance notice of the origin of the Coal and with the differential of freight rates applying only in favor of the City, were intended to cover a situation such as exists under the present general strike, and if insisted upon by the City they will seriously hinder our ability to obtain the proper supply of Coal for the City during this emergency.

"We are doing everything in our power to supply the City with the proper Coal under this emergency. We, therefore, respectfully request that, while the present Union strike in Indiana and Illinois lasts, the provision for advance notice of origin of Coal and for a lesser freight rate than that named in Section Six of the specifications, providing for advance notice of origin of Coal and reduction in price due to differential in freight rate as compared with original contract point of shipment be waived, all other provisions—including delivered B. T. U. for one cent—being complied with."

(2) REQUEST FOR AUTHORITY OF COUNCIL

"It is requested that the Commissioner of Public Works be authorized to pay for rail delivered and accepted coal, required to operate the City's pumping stations and power plants, making no deductions in prices for lower freight rates. The term during which such change in prices is to be allowed will be the period from the dates of the contracts affected to the discontinuance of the present coal strike, and until such further time as may be required to resume the actual production of coal.

"Reasons for this request are more fully set forth in a communication to the Commissioner of Public Works dated June 16th, copy of which is transmitted herewith.

"If this action meets with your approval, it is suggested that an order, of the intent as submitted herewith, be presented for passage to the City Council."

(3) CONTRACT PROVISIONS INVOLVED

"All coal furnished on contract shall be shipped from those of the mines specified by the bidder in his Proposal (Schedule No. 1), which are accepted by the City, to an unloading point arranged for by the Contractor for the unloading of cars for delivery to the station by truck. No cars reconsigned in transit or purchased on track will be accepted without written order of the Commissioner.

"Immediately following the shipment of each car the Contractor shall send notice to the City stating the following information: a—Car initial and number; b—Point of shipment; c—Name of shipper; d—Destination; e—Route; f—Kind of coal; g—Weight of car.

"Should shipment from either point named be interfered with by strike, fire or breakdown or shut-down of mine, the Contractor shall immediately notify the Commissioner in writing and obtain written permission for shipment from another designated mine, subject to approval by the Commissioner, during the interval of interruption.

"All coal accepted during such interval shall be subject to analysis and payment as above stated and subject to further reduction in price due to any difference in freight rates as compared with original contract point of shipment as stated in Schedule No. 1, but no allowance will be made if freight rate is more than that stated by the bidder in Schedule No. 1."

(4) COUNCIL'S SUGGESTED ORDER

"ORDERED, That the Commissioner of Public Works be, and he is hereby, authorized, during a period later herein defined, to pay for coal delivered and accepted under contracts with the Binkley Coal Company and the Sterling-Midland Coal Company, in accordance with all the other terms of the specifications relating to prices, excepting that no reduction be made in the price per ton because of lower freight rates.

"The period of time during which such price changes shall apply shall be from the dates of the

contracts affected, and shall terminate when the actual production of coal is resumed.

"The City Comptroller and the City Treasurer are directed to pass vouchers for payment in accordance with the above when approved by the Commissioner of Public Works, and to make the charges against the same appropriations as provided for the original contracts."

Your particular request is that we advise whether the particular clause complained of is binding, and if so, whether or not the City Council has the right to either grant or withhold the relief requested.

We perceive no legal reason why the particular clause or clauses herein set out are invalid or unenforceable as they appear in the contract. The contract was entered into by the coal companies without any reservation whatever against a contingency on account of the very strike conditions which are now set forth as the sole reason for the City's waiver of the provision for notice from the coal companies to the Commissioner of Public Works of the supplying of coal from other mines or places of supply than those specifically enumerated in the contract and for waiving the City's consideration of "a reduction in price due to any difference in freight rate as compared with original contract point of shipment as stated in Schedule No. 1." Not only are such provisions in the contract clearly valid but the strike conditions complained of furnish no defense on the alleged ground of impossibility of performance.

Having contracted "without reservation," subsequent impossibility of performance on account of strikes, causes other than the recognized common law "excepted risks," such contract may be enforced against the party who has failed to protect himself by specific provision therefor in his contract, and he will not be relieved from liability for

failure of performance. *Summers v. Hibbard, Spencer, Bartlett & Company*, 153 Ill. 102; *Berg v. Erickson*, 234 Fed. 817; *United States v. Gleason*, 175 U. S. 588; *Barry v. United States*, 229 U. S. 47.

The Court in the case of *Berg v. Erickson*, *supra* (p. 820), states the rule applying here as follows:

“Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for his nonperformance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one who makes a positive agreement to do a lawful act is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive covenant to enter into and become bound by the contract, and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense,” citing many cases.

In the present contract this very contingency is provided for and coal companies are thereby permitted to furnish contract coal from points other than those named in the contract, and as a special consideration for this privilege it is provided that the City shall have the “reduction in price due to any difference in freight rates as compared with original point of shipment. It seems to us that if the City should waive, as here requested by the coal companies to do, this stated consideration of the “difference in freight rates,” this waiver of the original contract provision would be unenforceable as against the City even if made as requested. This is upon the elemental principle that such new agreement as here requested would be invalid for lack of the essential element of consideration.

It is recommended, however, by the Commissioner of Public Works that the concessions here sought by the coal companies should be granted as they request, and the question is asked in behalf of your committee, "whether or not the City Council has the right to either grant or withhold the relief requested." We think the City Council has full power, "to either grant or withhold the relief requested." The situation between the City and the coal companies is like that between two contracting persons,—either party may grant or refuse to waive a provision affecting the other at that other's request. It is, therefore, clearly a matter of policy which is exclusively within the jurisdiction of the Council to adopt in the case. Just as the City might relinquish or compromise a right of action which it might have for breach of an existing contract, so may it likewise waive its enforcement of an existing provision as in this case requested and recommended by the Commissioner of Public Works.

In the event the City Council should decide to grant the concession asked by the coal companies the form of Council order here submitted is sufficient for the purpose.

(No. 6044—June 30, 1927—F. J. C.)

1 PERSONAL INJURIES, BILLBOARDS, LIABILITY.

A city is not liable for an injury caused by the blowing down of a bill board or sign from a roof, where the city had exercised reasonable care and diligence to prevent the injury.

2 MUNICIPAL CODE.

Section 903 is valid and in effect.

Hon. John A. Massen, Alderman, 48th Ward:

This department is in receipt of your letter of June 25, 1927, with reference to certain questions as they apply

to section 903 of the City Code. You refer to this section as 902 of the Building Ordinance. The first question that you ask, is this particular section of the ordinance still in force and effect and unamended. As far as the records in this office show this ordinance is still in force and effect and unamended. Your second assumption with reference to the reason for the passage of this ordinance is in all probability a correct assumption as to the motive of the City Council in passing this ordinance.

The first question as to whether or not the provisions of the section referred to is a constitutional and valid exercise of the police power has been answered by this department in an opinion rendered on December 17, 1915, appearing in the volumes of the Opinions of the Corporation Counsel and Assistants from May 1, 1915, to June 30, 1916, at page 586 of this volume. In that opinion the case of *City of Chicago v. The Gunning System* was cited as an authority holding that such ordinance is legal and enforceable under the police powers of the City.

As to question whether or not the City of Chicago is under any legal liability to any person injured as a result of the blowing down of a billboard or sign board which has been placed upon or above the roof of a building or structure within the limits of the City of Chicago with the consent or acquiescence of the Commissioner of Buildings, we desire to say that such liability would depend entirely on the facts and circumstances surrounding the particular accident. The same rules of law as to liability on the part of the City for personal injury to a person injured as you have described would depend on the fact as to whether or not the City had been guilty of some negligence either with reference to issuing the permit, inspection of the billboard or sign on the roof, and the question as to whether or not the City exercised reasonable care

and diligence to prevent such injury. If it could be shown that the City by or through its agents had allowed a particular sign to be in a state of disrepair and as a result of such condition the sign was blown over and injured somebody, then the City would be liable. Of course, this is on the assumption that no unusual weather conditions existed at the time the sign blew over. In other words, the City is only bound to exercise that degree of care that an ordinary individual would exercise under ordinary and normal circumstances, or if the condition of disrepair could not be determined by the exercise of reasonable diligence then the City would not be liable. If on the other hand by the exercise of reasonable care the City would have discovered a defect which would allow the sign to be blown over under ordinary weather conditions then the City would be liable, or if the City had received notice of the defect and had not exercised reasonable care and diligence, then the City would be liable for damage. In other words, the exercise of this power of the City is in no different condition than it is in in the exercise of other ministerial duties which come within the plan of the administering of the affairs of the City. It has been decided by our Appellate Court in the case of *Peter Sobieski v. City of Chicago*, 230 Ill. App. page 569, that the City is liable for injury sustained by reason of the blowing down of an obstruction placed in front of a building during the course of construction by reason of which the plaintiff in this case was seriously injured. There are a number of cases in this State passing on that question. Among them being the case of *Hanrahan v. City of Chicago*, 289 Ill. 400; *Johnson v. City of Chicago*, 258 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 371.

(No. 6045—July 5, 1927—F. J. V.)

1 ASSIGNMENT OF WAGES, INVALID.

Assignments of wages or salary by City employees with power of attorney to collect the same are against public policy and absolutely void, especially in case of Civil Service employees.

2 MANDAMUS, PAYMENT OF WAGES.

Payment of wages or salary of a City employee may be enforced by mandamus, notwithstanding its previous assignment.

Hon. Charles C. Fitzmorris, City Comptroller:

You recently submitted to us the "Notice of Lien" received from the Baldwin Piano Company of 323 South Wabash avenue, which purports to be based upon the assignment to the company of the salary and wages of Battista Gogla, who is a Civil Service employee in the Water Pipe Extension Division of your Department; and similar "Notice of Lien" on the salary and wages of G. Jones, a Civil Service employee in the alley cleaning service of the 8th ward, and notice of a power of attorney by said G. Jones to Capitol Credit House to collect his wages. You ask our opinion as to the proper legal procedure in these matters. Since both cases are governed by the same rules of law, one opinion will suffice and apply alike to both cases.

It has ever been the policy of the common law to forbid the assignment by public officers and servants of their salaries and wages. Such assignments are declared to be void as against public policy. The reason for the rule is stated to be the necessity of securing the faithful discharge of official duty and efficiency in the service rendered by paying the salaries and wages to those performing the work at the times appointed for such payments. *City of Chicago et al. v. People ex rel.*, 98 Ill. App. 517;

Shannon v. Bruner, 36 Fed. 147, 148; *Bliss v. Lawrence*, 58 N. Y. 442.

It is said in *City of Chicago et al. v. People ex rel.*, *supra*, that

“A municipal corporation exists for the public welfare only, and it cannot be forced into a position by which its duty as to its officials in respect to their salaries shall be not to pay them in accordance with their lawful right, but to pay the debts which they may be owing to creditors, or their stipend to those to whom they may have assigned it.” *Merwin v. City of Chicago*, 45 Ill. 133; *Johnson v. Pace*, 78 Ill. 143; *Addyson Pipe & Steel Co. v. City of Chicago*, 170 Ill. 500.

Not only is such assignment of official salary and wages void as against public policy, but so, also, is an attempt to make such assignment by the indirect means of a power of attorney to receive and collect them. 4 Ann. Cas. 424, note.

Mandamus will lie to enforce the payment of salary and wages to the public officer or servant despite such assignment thereof or power of attorney to collect the same. *City of Chicago et al. v. People ex rel.* 98 Ill. App. 517, 521.

We believe these rules are to be more vigorously applied against the assignment of the salaries and wages of Civil Service employees than that of others in the public service. The duties of the dispersing officer in the matter of auditing, certifying and paying salaries under the Civil Service Law and the rules of the Civil Service Commission would be well nigh impossible, if such assignments and powers of attorney to receive and collect were legal.

No procedure in official aid of the assignment here submitted can be taken because such assignments are void.

(No. 6046—July 11, 1927—L. H.)

INTEREST COUPONS, PAYMENT, ANNEXED TERRITORY.

Moneys belonging to a municipality whose territory has been annexed to the City and received and made a special fund may be used for the payment of interest coupons of bonds which the City has assumed with the other obligations of such municipality, without first passing a specific appropriation therefor.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter concerning the propriety of paying coupons attached to the bonds of the Village of Mt. Greenwood as they become due without order or appropriation by the City Council.

You state that pending the final adjustment of accounts in connection with the annexation of the Village of Mt. Greenwood the cash that has been received has been placed temporarily in a special deposit fund subject to final distribution and that meanwhile the holders of bonds on which the City assumes liability under the law have presented the semi-annual coupons for payment. No appropriation has been made by the City Council for the payment of this interest except in so far as there are sufficient funds in the general appropriation for the payment of interest on bonds. No appropriation can be made under the law at the present time, therefore, you ask whether it is proper to pay such interest without a specific appropriation therefor.

In our opinion such payments may properly be made out of the funds held by you in the special fund of which you speak. The Village of Mt. Greenwood made no appropriation for the current year and the City was not in a position to do so at the time it passed the annual appropriation bill. Nevertheless, if the bonds in question were duly authorized and approved by the vote of the

people it constitutes such an appropriation as authorizes the payment of the money out of this fund. Under section 4 of the Annexation Act of 1889 (Cahill's Stat. 1925, page 379) the City is bound to pay such interest and consequently it may use the money of the village that it is entitled to for that purpose. Upon the adjustment of the accounts and the distribution of the money on hand into the various funds which are entitled to same, due allowance should be made for such payment unless it should appear that there has been no tax levy covering the interest in question; if not, then a tax levy should be made along with the city's levies in 1928 and any fund which has been depleted by reason thereof should be reimbursed therefrom.

(No. 6047—July 12, 1927—L. H.)

SERVICES, PAYMENT, APPROPRIATIONS.

Services in good faith rendered to and accepted by a head of a department of the City government should be paid for by the City, although the indebtedness is irregularly incurred and there was no specific appropriation made therefor at the time of the rendition of the services.

Hon. John S. Clark, Chairman, Committee on Finance:

We are informed that under special agreement with the Board of Local Improvements there was earned and there remains due and unpaid, the sum of \$1,575.00 to Mr. Irvin Rooks, \$850.00 of same having been earned in the month of March, 1927, and \$725.00 in the month of April, 1927; also there was earned and is unpaid, the sum of \$1,150.00 due to Mr. Ross C. Hall, earned in April, 1927. Bills for this amount were rendered to the City of Chicago and are now in the office of the Board of Local Improvements. In addition to that, there is due a sum said to be \$1,200.00, representing legal services during the months of May and

June of this year, for which bills have not been submitted.

Inasmuch as the indebtedness above set forth was incurred for services actually rendered in good faith, although no specific appropriation was made therefor, we recommend that provision be made by the City Council for the payment of same through the release of the necessary money therefor. Our position in matters of this kind is that where the head of a department orders work of this kind done, even though the contract was irregularly entered into, the City is bound to pay for same if it accepts the services. *City of Chicago v. McGovern*, 281 Ill. 264.

(No. 6048—July 12, 1927—F. J. C.)

1 WATER MAIN, RELOCATION, APPROPRIATIONS.

A contract for the relocation of a water main can be made only in pursuance of an appropriation authorizing the expenditure of money for the purpose, or the contract can be based upon a special provision for the transfer of the money from some fund already appropriated for corporate purposes.

2 RELOCATION OF WATER MAIN, LIABILITY.

The City must bear the expense of the relocation of the water main under the River Straightening Ordinance.

3 CITIES, WATER SYSTEM.

In the operation of a water system, the City occupies the same position as a public service corporation and is not exercising a governmental function.

4 EXPENSES AND LIABILITIES, APPROPRIATION ORDINANCE NECESSARY.

The payment of expenses and liabilities of a City must be provided for by appropriation ordinance with each object and amount specifically stated.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter to this office dated June 27th, making inquiry as to the legality of relocating the 36-inch pipe in

15th Place from Loomis street to Blue Island avenue at the expense of the Water Fund has been received by this office. In your communication you call attention to an ordinance passed July 8, 1926, which is supplemental to the River Straightening Ordinance passed on the same date, and contained in the pamphlet attached to your communication. We agree with you on the proposition that in the relocation of this water pipe the City under the terms of said ordinance must bear the expense of such relocation.

As to your query as to whether or not the relocating of this water main at the expense of the Water Fund would be legal, we desire to say that in passing on this question we must have a reference to the laws of the state as they have application to the expenditure of funds by the City through its officials. Article VII of chapter 24, Smith-Hurd Statutes, 1927, at page 353, contains the provisions of the statutes as they have application to finances of the City. Section 2 of Article VII provides:

“The city council of cities, and board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. Such ordinance, in cities and villages having a population of one hundred thousand or more, may be amended at the next regular meeting of the city council or board of trustees, as the case may be, occurring not less than five days after the passage thereof, in like manner as other ordinances; and in case any items of appropriation contained therein are vetoed by the mayor or president of the board of trustees, as the case may be, with recommendations for alterations or changes

therein the adoption of such recommendations by a ye and nay vote shall be regarded as the equivalent of an amendment of such annual appropriation bill with like effect as if an amendatory ordinance had been duly passed. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each such appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them, or at a general or special election duly called therefor: Provided, however, that in cities and villages having a population of one hundred thousand or more, the city council or board of trustees, as the case may be, may, at any time within the first half of the fiscal year, by a two-thirds vote of all the members of such body, pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of section 1 of article VIII of this Act."

It will be seen by this provision that it is absolutely necessary under the terms of this Act for an appropriation to be made to defray all necessary expenses and liabilities of such corporation, and that such appropriation ordinance shall specify the objects and purposes for which the appropriations are made and the amount appropriated for each object and purpose.

There has been much litigation concerning the disposition and expenditure of the Water Fund for corporate purposes. There can be no question, and there is no question but that this 36-inch water main has been in place at 15th place for a considerable length of time, and presumably originally was placed there in furtherance of the building and maintaining of the water system in the City of Chicago. It is true that in the operation of a water system that the City acts in a different manner than it does in the exercise of an ordinary governmental function. In the case of *Bockenfeld v. City of Quincy*, 232

Ill. App. at page 52, the court says at page 58 in citing certain other decisions that have been handed down by the Supreme Court:

“In *Wagner v. City of Rock Island*, 146 Ill. 139, it was held in 1893 that: ‘A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation and not in the exercise of its powers of local sovereignty. If this power is granted to a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good.’

“This doctrine was affirmed in *City of Chicago v. Town of Cicero*, 210 Ill. 297; *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 544. In the latter case it was said: ‘They were applied to a common carrier, and to the city occupying the same position as a public service corporation in supplying water to the inhabitants of the city,—a public service performed by the city in the exercise of a private and not a governmental function.’

“It was further held in *Wagner v. City of Rock Island*, *supra*: ‘In separating the two powers—public and private—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant is for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company.’

“This doctrine also has been upheld in *City of Joliet v. Alexander*, 194 Ill. 465, and *Village of Palestine v. Siler*, 225 Ill. 637.”

In the case of the *City of Chicago v. Town of Cicero*, 210 Ill. at page 297, the court said:

“It is then urged that the act amounts to taking from the City of Chicago its property, viz., water supplied through its system of waterworks, without due process of law, and we are referred to the cases of *Wagner v. City of Rock Island*, 146 Ill. 139, and *City*

of *Joliet v. Alexander*, 194 *id.* 457, as authorities for the proposition that a city owning and operating a system of waterworks is engaged in a private enterprise, and while so doing is not exercising any governmental functions, and based on this conclusion we are cited to Dillon on Municipal Corporations."

It would seem from these decisions that the City in the building and maintaining and the operation of these water systems acts in a purely private and proprietary capacity rather than in its governmental capacity. If this situation was the only one that the court had passed upon, the question that you ask would be an easy one to answer, but in the case of *Schnell v. City of Rock Island*, 232 Ill. 89, at page 97, the court said:

"As to all the contracts and obligations other than the bonds, it is insisted, in support of the decree, that none of them created any indebtedness, for the reason that they were for current expenses or the moneys were payable out of the water fund and not out of moneys raised by taxation. The argument that no indebtedness is created where the obligation is to pay under some fixed and definite scheme, from some particular fund which is pledged for payment, is sustained by decisions of other courts; but after so many years of judicial construction, extending from the case of *City of Springfield v. Edwards*, 84 Ill. 626, to *Lobdell v. City of Chicago*, 227 *id.* 218, it is not necessary, and we would not consider it justifiable, to enter anew upon a discussion of the meaning of our constitution. Courts of the highest standing in other States have regarded the word 'debt' as a term of variable and flexible meaning and have been able to construe it as meaning something different from the common understanding. They have been unable to see any line of demarkation between the appropriation, by a municipality, of taxes which have been already levied and are legally certain to reach the treasury, where the appropriation operates only to assign the fund without creating any obligation on the part of the municipality, and a contract by which a municipality obligates itself to make levies in the future

and appropriate the same to a designated object. Those courts follow the cases mentioned in *City of Springfield v. Edwards*, supra, in which the opinion of the court was delivered by Mr. Justice Scholfield, a member of the convention which framed our constitution. It was there said that this court could only yield assent to the rule recognized by such authorities with these qualifications: 'First, the tax appropriated must at the time be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment must operate to prevent any liability to accrue on the contract against the corporation.' In that case, rules of construction were stated which have been consistently and uniformly adhered to, and from which we have no disposition to depart in order to promote schemes which may seem to be desirable or beneficial. The provision of the constitution in question imposes no limit upon the power of taxation and the Legislature may authorize municipalities to raise moneys sufficient for their needs, but the constitution does prohibit an indebtedness beyond a certain limit, and it must be enforced according to its plain meaning. If public officials feel that they are unduly hampered in the execution of plans for the public good, the remedy is not to be found in destroying the limitations of the constitution. * * *

"It was held that the issuing of obligations payable out of a particular fund creates an indebtedness if the fund is an existing, established income belonging to the municipality. Every indebtedness is payable out of some fund, and it is immaterial, on the question whether an indebtedness is created, that the obligation is payable out of a particular fund. Taxpayers are interested in all funds of the city, regardless of the source from which they come,—whether from licenses, taxation or furnishing water to individuals. In this case the entire proceeds of the existing waterworks system were pledged to secure payment of the certificates and they created an indebtedness against the city. The case is not like that of *Village of East Moline v. Pope*. 224 Ill. 386, where

the scheme was to erect and establish a new system of waterworks. It was there said, in accordance with the principles of *City of Joliet v. Alexander, supra*, that if nothing but the income from the waterworks had been pledged or could be reached the bonds would not create a debt, and in that case relief was granted because of the provision for a special tax. A city may acquire a system of waterworks by pledging the income until it shall pay for the system, and no indebtedness is created. The same rule might apply to some definite extension of waterworks where the income of the extension could be separated and applied to payment, but an obligation to pay with the income of property already owned by a city is not different from an obligation to pay with any other funds, so far as the question whether the transaction amounts to a debt is concerned. In the cases of *City of Springfield v. Edwards, supra*; *Prince v. City of Quincy*, 105 Ill. 138, and *Prince v. City of Quincy*, 128 *id.* 443, it was held that when the limit has been reached a municipality is prohibited from making any contract whereby an indebtedness is created, even for the necessary current expenses in the administration of the affairs and government of the corporation. The city so indebted must carry on its corporate operations upon the cash or pay-as-you-go plan, and not upon credit to any extent or for any purpose."

It will be seen that the courts make a distinction as to expenditure of money out of the Water Fund where such expenditure is made for the purpose of building or extending the water system, and a city is acting in its private capacity and the expenditure of money for a purely corporate purpose after the money has been definitely collected and is a part of the water fund. The necessity for the work which you describe in your letter is created by the ordinance of July 8, 1926, by which ordinance the city exercises a governmental function and power in vacating the streets described in said ordinance, so that it will be seen that the relocating of this water main is made necessary by the passage of the ordinance of July

8, 1926. This being the case it would seem that in order to do this work in accordance with the general scheme under the ordinance of July 8, 1926, the city in carrying into effect the provisions of that ordinance, would have to enter into a contract and that the making of such contract for the purpose of changing or relocating the water main described would be a corporate act, and the expenditure of that money would necessarily come under the provisions of that part of article VII of chapter 24 above referred to and above set forth.

We are, therefore, of the opinion that in order to make such a contract legal and binding it will be necessary for the City Council to make an appropriation authorizing the payment of money for the services to be performed and the material to be furnished or make some provision for the transfer of some fund already appropriated for corporate purposes so that such fund will be available for the payment of the expenses necessarily incurred for the contract to relocate this water main.

(No. 6049—July 12, 1927—F. J. C.)

PENSIONS, DEATH BENEFIT, POLICEMAN KILLED BY BOMB.

Death benefits under the Act of 1921 as amended are payable to a widow and minor children or next of kin of a policeman or fireman only when such policeman or fireman is killed while engaged in the performance of his duties connected with his department or office. A policeman who is at home is off duty, and if killed there, his widow is not entitled to death benefits under said Act.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of your letter of July 1st regarding the claim of Mrs. Fred Schmitz, the widow of Patrolman Fred Schmitz, deceased, in the amount of \$10,000 death

benefit on account of the loss of the life of her husband by being bombed.

We have heretofore had occasion to write your Committee in reference to the law as it applies to claims of this character. The power to pay such claims is given the City under "An Act authorizing cities and villages to provide for the payment of allowances of money to the families or dependents of policemen and firemen killed or fatally injured while in the performance of their duties," approved June 27, 1921, Laws 1921, page 334, as amended by an act approved June 30, 1925. Laws 1925, page 241. The amendment of 1925 fixes the sum of such benefit so that such sum shall not exceed the amount of \$10,000. The language of the act is as follows, as shown in Smith-Hurd's Statutes, 1925, chapter 24, paragraph 867, at pages 477 and 478:

"That, in addition to all other powers now granted by law, the city council of any city and the president and board of trustees of any village may, by general ordinance, provide for the payment of an allowance of money, to be fixed by such city council or board of trustees, as the case may be, to the family or dependents of any policeman or fireman employed by such city or village in case he is killed or fatally injured while in the performance of his duties. The sum so fixed shall not exceed ten thousand dollars and shall be payable only in case the injury arises from violence or other accidental cause and death is directly due to such cause and results within one year after such injury. Any payment made hereunder shall be for the use and benefit in equal parts to the widow and minor child or children of the deceased, or to the minor child or children if there is no widow, or the whole sum shall be payable to the widow if there are no minor children, or if there is no widow or child of the deceased the said payment shall be made for the use of the next kin actually dependent on the deceased at the time of his death: Provided, that a female unmarried child of full age or a male

child that is physically or mentally disabled, in case he or she is dependent on the deceased for support at the time of his death, shall be entitled to the use and benefit of such fund in the same manner and to the same degree as a minor child; and provided, further, that nothing in this Act contained shall prevent the city council or board of trustees, as the case may be, from making provision by ordinance for the conservation of the money thus paid and the income therefrom through the means of a duly accredited National or State bank acting as trustee of the fund created thereby and making payments therefrom at stated intervals to such family or dependents."

It will be seen from the language of this act that such benefit fund is payable only when death results by violence or accident while the deceased policeman or fireman is engaged in the duty of his position.

From an examination of the files in this case it appears that the deceased resided at 5233 West Van Buren street; that at about 8:35 p. m. November 9, 1925, a bomb was placed or thrown by some unknown person at the front window of the basement of the home of the deceased; that at the time of the explosion the deceased was at his home engaged in some occupation in the home; and that he was not at the time engaged in the performance of any duty connected with the police department. The statements of the witnesses who gave testimony show that when the bomb exploded Mr. Schmitz was killed, so that by all of the information and all of the record there is no indication that Mr. Schmitz' injury was the result of any violence or accident which in any measure could be defined to be violence or accident occasioned by the exercise or the performance of his duty as a police officer.

We are therefore of the opinion that the above quoted act has no application to the present case and that the

widow and children of the deceased are not entitled to the benefits fixed in that act.

We therefore recommend that this claim of \$10,000 be disallowed.

(No. 6050—July 12, 1927—F. J. C.)

1 DEATH BENEFIT, INJURY IN COURSE OF EMPLOYMENT.

Assisting other police officers to crank a Ford which results in a fatal injury to the officer who did the cranking is regarded as having been done in the course of employment within the meaning of the Death Benefit Statute and Ordinances where all the officers are at the time on police duty and the starting of the Ford was necessary to its performance.

2 INJURIES, COURSE OF EMPLOYMENT.

No general rule can be laid down which would in all cases determine when an injury arises "in the course of employment" or "in the performance of duty," but each case depends upon its own circumstances.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of your letter of July 8, 1927, in which you ask us to advise you as to the City's liability in the case of Patrolman Edwin J. Halloran under the provisions of the law and the ordinances authorizing the City to pay death benefits to a policeman or fireman killed while in the performance of his duties.

We beg to advise you that the authority to pay such claims is found in an act entitled "An Act authorizing cities and villages to provide for the payment of allowances of money to the families or dependents of policemen and firemen killed or fatally injured while in the performance of their duties," approved June 27, 1921. (Laws 1921, page 334, as amended by an act approved June 30, 1925, Laws 1925, page 241); and that the ordinance in force is a practical re-enactment of the statute itself. This

ordinance is found under section 3132 of the Code and the amendments to it. This section has been amended to conform with the law of 1925, above referred to, and by such amendment the amount of benefit was increased from \$7,500 to \$10,000. This act will be found in Smith-Hurd's 1925 Statutes, chapter 24, paragraph 867, page 477, and reads as follows:

“That, in addition to all other powers now granted by law, the city council of any city and the president and board of trustees of any village may, by general ordinance, provide for the payment of an allowance of money, to be fixed by such city council or board of trustees, as the case may be, to the family or dependents of any policeman, or fireman employed by such city or village in case he is killed or fatally injured while in the performance of his duties. The sum so fixed shall not exceed ten thousand dollars and shall be payable only in case the injury arises from violence or other accidental cause and death is directly due to such cause and results within one year after such injury. Any payment made hereunder shall be for the use and benefit in equal parts to the widow and minor child or children of the deceased, or to the minor child or children if there is no widow, or the whole sum shall be payable to the widow if there are no minor children, or if there is no widow or child of the deceased the said payment shall be made for the use of the next kin actually dependent on the deceased at the time of his death; provided, that a female unmarried child of full age or a male child that is physically or mentally disabled, in case he or she is dependent on the deceased for support at the time of his death, shall be entitled to the use and benefit of such fund in the same manner and to the same degree as a minor child; and provided further, that nothing in this Act contained shall prevent the city council or board of trustees, as the case may be, from making provision by ordinance for the conservation of the money thus paid and the income therefrom through the means of a duly accredited National or State bank acting as trustee of the fund

created thereby and making payments therefrom at stated intervals to such family or dependents.”

We have examined the authorities in this State for the purpose of ascertaining the construction usually placed upon a meaning of the phrases “course of employment” and “the performance of duty.” Most of these decisions have reference to a construction of the words used in the Workmen’s Compensation Act, but in laying down general rules the court has made and given a precedent as to the construction of the purpose of the Compensation Act and the purpose of the Pension Act. In all of these constructions the court has sought to construe the statutes favorable to the beneficiaries under them. The courts have recognized the difficulty of laying down a hard and fast rule which is general in its character, but have said that each case must be determined by the facts and circumstances of the particular case.

In the case of *Dietzen Co. v. Industrial Board*, 279 Ill. page 11, the court said at page 16:

“It is stated that it may be ‘difficult to conceive of any injury which arises “out of” the employment which does not arise “in the course of” it; * * * The determination of this question presents one of the most difficult problems in connection with the act. It has been said that each case must depend upon its own circumstances and cannot be solved by reference to any formula or general principle.’”

In order to intelligently discuss and apply the provisions of the act above referred to, it might be well to discuss the facts as they are presented by the record. The witnesses in this case agree in their statements as to how the accident occurred. The eyewitnesses, August Ptacek and John Milne, made reports of this accident on January 20, 1927. From their statements it appears that on De-

cember 27, 1926, these two witnesses were assigned to Ford No. 39 at the 30th District Station between the hours of midnight to 8 a. m.; that at about 12:05 a. m. Officer Milne attempted to start the motor of the Ford and in doing so cranked it several times without result and was unable to start the motor in the machine; that while he was cranking the motor, Officer Halloran, who was on the way to the post to which he was assigned, came out of the barn door, took hold of the crank handle and turned the crank handle two or three times when it kicked back and Halloran informed both of the officers that he received a blow on the arm which almost broke it; that he received a bruise on the elbow of his left arm when the engine back fired; that Halloran afterwards turned the crank of this machine and the motor started; and that at that time Officer Halloran received no medical attention.

The Ford machine in question was parked in the alley and the two officers, Ptacek and Milne, were relieving the middle crew, as they termed it, and were preparing to go on the street for the regular tour of duty, but they were not answering any alarm or call.

The medical report of the accident shows that a doctor, R. E. Flannery, attended the deceased on December 30, 1926, three days after he had received his injury.

The doctor, in his report, stated that the patient gave a history of having injured his arm while cranking a Ford automobile on December 27, 1926; that on January 10, 1927, the doctor discovered a deep-seated abscess lying anterior to and external to the lower end of the humerus; that several days thereafter the patient developed a rapid gangrene of the left hand which necessitated amputation just above the elbow; that on January 13th he developed a swelling of the left knee and died on the same day from

a general septicemia following the injury to the lower end of the humerus.

On January 12, 1927, Dr. J. P. Collins, police surgeon, went to St. Mary's Hospital and found the patient suffering from septicemia. The seat of the infection was in the left arm near the elbow. The patient was delirious and according to statements of hospital attendants the prognosis was very bad. Dr. Collins reported that Dr. Flannery was the attending physician.

From these facts and this history it is apparent that at the time of the accident the deceased had reported for duty and was on his way to the post assigned him by his commanding officer. It is also apparent that the officers in charge of the Ford automobile were preparing to go on the street in the discharge of their duties as members of the automobile squads. It is also apparent that in the discharge of their duties it was necessary for the two officers to start their machine in order to make the tour of the district. They were unable to start or crank their machine and their fellow officer, the deceased, offered to assist them in doing so, and as a matter of fact did assist them and did start the machine; but before having started it received the injury which resulted in his death approximately ten days after the occurrence of the accident. There can be no question from the evidence presented here in this record that the deceased came to his death from the injury occasioned by the accident and within a period of less than one year from the date of the accident.

There are other instances cited in the *Dietzen Case* above quoted in which the court has laid down rules as they have application to the particular and specific statements of fact. At page 16 *et seq.* the court says:

“An accident only arises out of and in the course of a workman's employment when it arises from his

doing or omitting to do some act within the sphere of his employment. If he chooses to step outside the sphere of his employment and to do something he is not expected or required to do, he does so at his own risk and is not under the protection of the act. * * *

"If the act which caused the injury was within the scope of the servant's employment, the mere fact that he had been expressly forbidden to do that act will not necessarily be fatal to his claim. * * *

"Where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not held liable; also where a servant voluntarily and without direction from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. A master is not liable for the injuries to his servant unless the servant was at the time in the performance of some duty for which he was employed. A volunteer is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not bound to do or which is not in pursuance or protection of any interest of the matter, and which is undertaken in the absence of any peril requiring him to act as on an emergency. * * *

"These rules were briefly summed up in *Moore v. Manchester Liners*, (1910) A. C. 498, where it was stated an accident to an employee occurs in the course of employment when it takes place 'while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing.' * * *

"It is the rule that an employee is engaged in the course of his employment when the injury occurs within the period of his employment, at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it."

On page 19 in the same case the court cites the following example as an authority to show that a person who is act-

ing in the course of employment and in the interest of his employer comes within the purview of the act:

“Authority for a servant to act on an emergency, in his master’s interest, may be implied. Where a workman was injured in attempting to stop his master’s runaway horse it was held that the accident arose out of and in the course of the employment although his work was wholly unconnected with the horse.”

In this case I made an exhaustive review of all the cases and have reached the ultimate conclusion that each case depended entirely upon the facts in that case.

The distinction between the language of the Workmen’s Compensation Act and the Act involved in this case is that in the Workmen’s Compensation Act the language “in the course of employment” is used, and in the present Act the words “in the performance of duty.” The courts generally in construing the meaning of the word “duty” have adopted the definition as given in most of the standard dictionaries where duty is defined as “any requisite procedure, service, business or office; that which one ought to do; particularly, any stated service or function; as the duties of one’s station in life; to go or be on duty; the regiment did duty in Flanders.”

In defining a policeman’s duty the Supreme Court of Missouri said: “In construing the statute with reference to the meaning of the word ‘duty’ the statute says ‘duties’ and that is broad enough to cover all duties, whether implied from the nature of the office or laid down by the statute or the manual.”

The word “duty” is defined in 19 Corpus Juris at page 841 as “A human action which is exactly conformable to the laws which require us to obey them; the power to command and coerce obedience; a right due from a person; a service, business or office.”

Applying the rule laid down by the Supreme Court in the *Dietzen Case* and giving effect to the definitions and meaning of the words in the statute, a court in construing the situation would necessarily have to infer that from the moment the deceased left the police station to go to his post of duty he was then engaged in the performance of his duty as a police officer, and that his actions as a police officer would require him to do all the things necessary to faithfully perform those duties in order to follow the rules and regulations, the ordinances and the statutes to carry into effect those things that constitute his duties.

It was apparent that two of these officers were in difficulty. If they had been making an arrest or had been performing any of their duties or functions as police officers, it would have been the deceased's duty to help and assist them carry their duties into effect. The Ford automobile which they were cranking was a necessary instrumentality that they used in the performance of their duties. If it had not been started, and if they could not have started it without the assistance of the deceased, and they apparently could not start it without his assistance, then they could not have used this car to perform the duties to which they were assigned, and it would be technically somewhat captious to try to evade the payment of the benefit fixed by the statute to say that this deceased was not actually engaged in the performance of his duty as a police officer.

While there is no evidence to show that these officers in charge of the Ford car requested the assistance of the deceased, yet it became his duty upon observing that they were having difficulty in using the thing necessary for the performance of their duty to assist them, and we are of the opinion that when the deceased came to the aid of his fellow officers he was actually engaged in the dis-

charge and performance of his duty. There can be no question that this injury caused his death within the time fixed by the statute.

After reviewing the facts in this case, we are of the opinion that this death comes within the definition prescribed by the statute above referred to, and therefore recommend that this claim be paid for the amount and in the manner that the statute prescribes.

(No. 6051—July 12, 1927—C. H. L.)

1 LICENSES, DOG RACE TRACK.

A "dog race track" is an amusement within the meaning of sub-section 41, section 1, article 5 of the Cities and Villages Act and is subject to an amusement license under classes 12, 13 and 22 of section 176 of the Amusement Ordinance.

2 AMUSEMENT ORDINANCE.

This ordinance includes the licensing of a dog race track.

Hon. Morris Eller, City Collector:

We are in receipt of your communication of July 6, 1927, in which you request our opinion as to whether or not a "Dog Race Track," operated within the limits of the City of Chicago, is subject to a City license, and in which you propound the following questions: 1. Is the operation of a "Dog Race Track" subject to a City of Chicago license? 2. If so, under what classification? 3. If the answer to question No. 1 is in the affirmative, shall the City Collector, in accordance with the provisions of section 2414-A of the Chicago Municipal Code accept an application for the license, accompanied by the license fee?

Addressing ourselves to the first question asked, we beg to advise as follows:

Section 1 of article 5 of the Cities and Villages Act provides that the city council in cities shall have the following powers:

“Subsection Forty-first. To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals *and other exhibitions, shows and amusements*, and to revoke such license at pleasure.

“To license, tax and regulate baseball exhibitions, wrestling matches, walking matches, automobile races, bicycle races *and all other athletic contests and exhibitions carried on for gain*, such tax to be fixed or based on the gross receipts derived from the sale of admission tickets to such exhibitions, matches, races or other athletic contests, said tax, however, not to exceed three per cent of such gross receipts.

“Subsection Fifty-eighth. *To regulate places of amusement.*

“Subsection Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

“Subsection Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

Subsection One-hundredth and second. To pass all ordinances, rules and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: Provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense.”

Cities and villages are granted specific power by the aforesaid provisions to license, tax and regulate exhibitions, amusements and places of amusement.

Webster says that the word “amusement” is synonymous with diversion, entertainment, recreation, pastime and sport. The entertainment provided within a “Dog Race

Track" is certainly an amusement within the meaning of that word.

The ordinance on Amusements adopted by the city council of Chicago and found on page 42 of the Chicago Municipal Code of 1922 is within the powers conferred upon the City of Chicago by virtue of the Cities and Villages Act and its subsections above quoted.

From the said Amusement ordinance we quote as follows:

"Sec. 176. *Classification for license.* All theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee, are hereby divided into the twenty-two classes hereinafter designated. Such theatricals, shows, and amusements are, for the purpose of this chapter, hereinafter referred to by the general term 'entertainments,' and the theater, opera house, auditorium, hall, park, grounds, gardens, tent or other enclosure within which it is intended to produce, offer or present any such entertainments, for the purpose of this chapter, is hereinafter referred to by the general term 'place.'

"12th Class. Poultry shows, horse shows, stock shows, flower shows, *dog shows*, cat shows, automobile shows, business and business appliance shows, industrial and trade shows, billiard or pool matches, exhibits or contests of balloons or aeronautic devices, *or any similar entertainment intended to represent any sport, art or science or the progress and development of the same.*

"13th Class. All circuses, menageries, or combined circuses and menageries, wild west shows, *dog* and *pony shows*, monkey shows and caravans.

"22nd Class. All entertainments, exhibitions, performances, or amusements not included in any of the foregoing classes.

"Sec. 177. *License required.* No person, firm or corporation, either as owner, lessee, manager, officer or agent, shall give, conduct, produce, present or offer for gain or profit, any of the entertainments speci-

fied in the preceding section (176) without first having obtained a license therefor.

"Sec. 182. *Where classes are mixed.* Where any entertainment embraces two or more of the classes above specified, such entertainment shall be classified and charged for as wholly belonging to that class for which the highest license fee is fixed."

In view of the foregoing we are of the opinion that a "Dog Race Track" is subject to the regulations of Section 176, classes 12, 13 and 22 of the Amusement Ordinance and beg to answer your questions as follows:

1. The operation of a "Dog Race Track" within the city limits is subject to a City of Chicago license.

2. Under the particular class of entertainment under Section 176, of Classes 12, 13 or 22, of the Amusement Ordinance for which the highest license fee is fixed.

3. Yes.

(No. 6052—July 14, 1927—F. J. V.)

1 WATERS, NORTH BRANCH OF CHICAGO RIVER, SEWAGE DEPOSIT, DREDGING.

Both the City and the Sanitary District of Chicago are under the legal obligation to keep the north branch of the Chicago River free from sewage deposit and after determining the amount of sewage deposit each municipality is responsible for they may agree between themselves as to what proportionate share of the expense of dredging the river each is to bear in connection with the proportionate share the general government is to pay.

2 WATERS, NORTH BRANCH OF CHICAGO RIVER, FEDERAL GOVERNMENT.

In matters of interstate commerce and navigation the Federal government has exclusive jurisdiction over the north branch of the Chicago River; and that government has shown an interest to the extent of being willing to bear 40 per cent of the cost of dredging said River.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are replying to your recent communication on the subject of dredging the North Branch of the Chicago River.

The proposition is one which affects the United States Government, the Sanitary District and the City of Chicago. After stating in your letter the facts and the situation, which indicate the necessity for the proposed dredging, and after referring to the negotiations had with a view to accomplishing it, you conclude, "since this is a very important matter involving the expenditure of considerable money, I would greatly appreciate having an expression from you, defining the legal status of the situation upon receipt of which a policy may be established for the whole proposition."

A concise statement of the facts and the situation necessary to a statement of the law and a legal opinion is contained in your communication to us, and we therefore present it here in full, viz.:

"I am in receipt of a letter from His Honor, the Mayor, transmitting a letter dated June 4th from Colonel Edward H. Schulz, United States Engineer, together with a letter dated May 24th from the Chicago Waterways Association—all having for their subject a proposition for dredging the North Branch of the Chicago River.

"In the past two years, this matter has had the attention of the City Department of Public Works and the Law Department, and since no definite action resulted it is necessary that the matter be given renewed consideration with a view toward a solution of the problem. The salient points are set out in what follows: Prior to 1919 the Government maintained the project navigable depths in the Chicago River and its branches. The River and Harbor Act of March 2, 1919, dropped from the Federal Maintenance Dredging Project the North Branch of the Chicago River between North avenue and Belmont avenue. The reason for the Government abandonment at that time was given that the commerce on the River was diminishing and the River was being shoaled from sewage deposits to a degree as to make Federal expenditure unwarranted.

"Therefore, since 1919, no dredging was done in the North Branch north of North avenue, except a small amount done by the City in 1924 south of Fullerton avenue, with the result that the continued accumulation of sewage deposit has impaired the navigable capacity of the North Branch to a degree that commerce is seriously hampered.

"Failure on the part of the Municipal authorities to take up the question of dredging the North Branch as abandoned by the Government, caused the United States Engineer Department to propose further curtailment of the Federal Dredging Project in the North Branch by dropping from the Federal Project Maintenance dredging in the North Branch between Lake street and North avenue; said action having been contemplated under date of August 18, 1925.

"The City and the steamboat interests prevailed upon the United States District Engineer to hold this recommendation in abeyance until the matter was properly investigated and adjusted. The proposition resulting from these negotiations was that a fair solution of the problem would be to have the Government pay forty per cent and the Municipality sixty per cent of the cost of dredging the North Branch of the Chicago River south of North avenue.

"The Harbors, Wharves and Bridges Committee of the City Council were informed of—and, in fact, were familiar with the negotiations and of the efforts of the steamboat interest to have the River dredged, but no action was taken to set up appropriations for the necessary dredging because it was pointed out that since the Sanitary District by its method of sewage disposals was shoaling the River, it was incumbent upon that body to remove the obstruction to navigation caused by said shoaling.

"Efforts were made at frequent times subsequently to have the Sanitary District assume their responsibility, but it is regretted that the efforts have been unsuccessful to date."

To the extent that the Chicago River is navigable, it is within the original and primary jurisdiction of the United States Government by reason of its exclusive power over in-

terstate commerce and navigation. (*Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 2 L. ed. 60.) The Congress originally appropriated and provided for the dredging of the River. For the stated reasons—the diminishing commerce and the shoaling of the River with sewage deposits to the extent that further Federal expenditure became unwarranted—the Government abandoned the dredging of part of the River and later proposed to abandon another part. Before the abandonment of the second part of the River, “the City and the Steamboat interests,” in negotiations with the General Government, secured what is submitted to be a fair solution of the problem,—a proposition that “the Government pay forty per cent and the Municipality sixty per cent of the cost of dredging the North Branch of the Chicago River south of North avenue.”

There is no controversy with the General Government. If the Government is to participate in the project of dredging this part of the River and in the payment of any part of the cost thereof, it must be upon the acceptance by the Sanitary District, or the City of Chicago, or both, of the foregoing proposition submitted by the Government. The matter of accepting this proposition must therefore, be determined by negotiation and contract between the two municipalities.

As a matter of legal duty it would seem to devolve upon the Sanitary District to keep the River free from the shoaling caused by sewage deposits. There can be no question of the power of the Federal Government to compel the Sanitary District to remove from the River and to keep free therefrom all such sewage deposit as might hamper or obstruct in any degree the free navigation of the River for purposes of interstate commerce. Apparently, however, the General Government regards the commerce here involved so far local to the City of Chicago and to the Sanitary Dis-

trict as to prefer to abandon the River dredging project. As between the two municipalities we perceive no such legal coercion to enforce action as exists in the power of the Federal Government. In view of the attitude of the Government it remains for the City and the District to act, if any dredging of the Chicago River is to be had, with or without the Federal Government's cooperation, and these municipal corporations can only deal with one another at arm's length.

Obviously, the City and the Sanitary District have interests in common to be subserved by a policy of dredging the River. Therefore the only question to be determined, as it appears to us, is the extent to which the two municipalities should respectively participate in the project, and the proportionate share of the sixty per cent cost of the project that each should assume in contract between themselves and in acceptance of the General Government's proposition. In negotiating for an agreement, proper and legal elements to be considered are the respective interests to be promoted and benefits to accrue to the municipalities in adopting and maintaining a policy of dredging the Chicago River, and the causes which each corporation contributes to create the condition in the River which makes dredging necessary. These in themselves furnish a valid consideration for any contract that might be entered into. There remains to be considered only the question of the power and authority of these municipalities, the Sanitary District and the City of Chicago, to execute such a contract.

Ample power and authority are vested in the Sanitary District by the Legislature in an Act entitled "*An Act to create sanitary districts and to provide for sewage disposal*," approved June 5, 1911, and another enactment, by the same title; approved June 22, 1917. (Smith-Hurd's

Stat. 1923, ch. 42, pp. 811, 816.) By section 7 of both acts, it is provided that:

“The Board of Trustees of any Sanitary District organized under this Act shall have power to provide for the disposal of the sewage thereof, and to save and preserve the water supplied to the inhabitants of such district from contamination, and for that purpose * * * such board may provide for the drainage of such district by laying out, establishing, constructing and maintaining one or more channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed, in a satisfactory manner. * * *.”

Section 16 of said Acts expressly empowers the board of trustees of the Sanitary District to appropriate to the uses and purposes of the district “any existing drains,” etc., upon the following stated condition, however, viz.:

“Provided, the public use thereof shall not be unnecessarily interrupted or interfered with, and that the same shall be restored to its former usefulness as soon as practicable.”

The following provisions of section 1, article V of the Cities and Villages Act expressly empowers the City Council:

“Twenty-ninth. To construct and keep in repair culverts, drains, sewers and cesspools and to regulate the use thereof.

“Thirtieth: To deepen, widen, dock cover, wall, alter or change channel or watercourses.”

Not only are the foregoing powers expressly conferred upon the Sanitary District and the City of Chicago pertaining to the matter of dredging the Chicago River, but these two municipalities are also expressly empowered

by the Legislature to enter into the very contract which is here involved. This is by an Act approved June 28, 1923, and section 1 thereof is as follows:

“That the Sanitary District of Chicago be and it is hereby authorized and empowered to contract upon such terms as may be agreed upon with the corporate authorities of any city, incorporated town or village within the limits of the Sanitary District of Chicago, to allow and permit the Sanitary District of Chicago to enter upon and use any sewer or drain or any system of sewerage or drainage or any part thereof of any such city, incorporated town or village, and to enlarge, reconstruct, repair, maintain and operate the same.” Smith-Hurd’s Stat., 1923, ch. 42, p. 832.

Upon the foregoing statement of the law it clearly appears that the Sanitary District and the City of Chicago have full power and authority to contract between themselves as to the terms, conditions and considerations upon which they will participate in the proposed project for dredging the Chicago River and divide between themselves the sixty per cent of the cost of the project in their acceptance of the Government’s proposition to co-operate.

It may not be inappropriate to suggest here that much that is necessarily involved in the negotiation between the Sanitary District and the City is more matter of fact than of law. Thus it is matter of law that the District is in duty bound to provide for the removal of all sewage deposit occasioned by its use of the River, but it is a question of fact whether the present condition of the River is due solely or in large measure to such sewage deposit. In like manner it is incumbent upon the City of Chicago to remove from the River any deposits or obstructions due to the City’s own use of the River, but to what extent the City is actually responsible for the present River condition is a question of fact. It is also a matter of law that each of the contracting parties should share the costs of the

project in proportion to their respective interests to be subserved and benefits to be derived, but what these interests and benefits may be presents a question of fact. The courts recognize the difficulty that sometimes confronts contracting parties in deciding mixed questions of law and fact. We had occasion to write an opinion and draft a form of contract for the Sanitary District and the City of Chicago in the matter of the construction of a bridge at Crawford avenue. The project included approaches, viaducts and street improvement, and the question there, as here, was the respective liabilities of the parties and their proportionate shares of the cost of the proposed improvement. (See Opinions of Corporation Counsel, 1924-1925, p. 392.) In speaking of the contract elements there involved the Supreme Court, in *Chicago v. P., Ft. W. & C. Ry. Co.*, 247 Ill. 319, 322, 323, said:

“A bridge includes abutments and such approaches as will make it accessible and convenient for public travel. It has been held in some cases that whether a particular bridge includes approaches depends on the circumstances in which the word ‘bridge’ is used. (*State v. Illinois Central Railroad Co.*, 246 Ill. 188, p. 286). * * * What is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law and are sometimes not easy to decide. *Tolland v. Wellington*, 26 Conn. 578.”

It seems to us, therefore, that the questions involved in the project of dredging the Chicago River are more questions of fact than of law, which must necessarily address themselves to the sound judgment and official discretion of the Board of Trustees of the Sanitary District and the City Council of Chicago. Any contract between the two municipalities for participation with the Federal Government in the proposed dredging of the Chicago River based

upon their powers and functions as here indicated, will be valid and sustained, unless there should appear in such contract a palpably illegal judgment or a wanton abuse of official discretion.

We trust that this opinion fully complies with your request and that it may prove useful in negotiating the important project of dredging the Chicago River.

(No. 6052 $\frac{1}{2}$ —July 15, 1927—F. J. V.)

1 CITY CLERK, PRINTING.

It is the duty of the City Clerk under ordinance to make provision for the printing of council proceedings, license forms, metal plates and badges.

2 BIDS, ACCEPTANCE OR REJECTION.

The party or officer who passes upon public bids must exercise a sound discretion in their acceptance or rejection and should consider not merely the pecuniary ability of the bidder to perform the contract, but also his skill, ability and integrity; and the rejection of the bid must not be arbitrary, capricious or based upon favoritism: which discretion is not reviewable by the courts or controlled by mandamus.

3 CONTRACTS, AWARD.

Contracts can be let only to the lowest responsible bidder.

4 WORDS AND PHRASES.

The "lowest responsible bidder" is one who not only has pecuniary ability to perform the contract, but who also, in point of skill, ability and integrity is the most likely to do faithful, conscientious work and fulfill the contract promptly according to its letter and spirit.

Hon. Patrick Sheridan Smith, City Clerk:

Under date of the 13th instant you made inquiry as to what would justify the rejection of the lowest bid in the letting of a certain contract for public printing. In the absence of a statement of any specific ground or rea-

sons for such rejection, we beg to submit the following general opinion as applying to such cases:

By virtue of the express grant of power to the City Council (Cities and Villages Act, sec. 3, art. VI, Smith-Hurd's Stat. 1927, ch. 24, p. 352) to "prescribe the duties and define the powers of (city) officers," the Council by ordinance empowered the City Clerk

"To award and execute contracts for printing the proceedings of the City Council and for all such license forms, metal plates and badges as shall be necessary for the issuance of licenses; provided, that all such contracts shall be let to the lowest responsible bidder after advertising in the same manner as is provided for the letting of contracts for materials or supplies by the department of public works." Sec. 16, ch. III, Municipal Code, 1922, p. 5.

It is plainly the duty of the City Clerk to let such contract "*to the lowest responsible bidder.*"

Lowest *responsible* bidder, in no case means merely the bidder whose bid is lowest in nominal amount stated. *Anderson v. School Bd.* (Mo.), 26 L. R. A. 707, and cases cited in note thereto; *Words and Phrases*, Vol. 5, pp. 4254-5; *People v. Kent*, 160 Ill. 655; *Kelly v. City of Chicago*, 62 Ill. 279.

Just what is meant by the phrase, "lowest responsible bidder," and what would justify the rejection of another bid lower in its stated contract offer, is best described in the language of the Illinois Supreme Court, in the case of *People ex rel. Assyrian Asphalt Company v. Kent, Comr.*, 160 Ill. 655, pages 660, 661 and 662. We deem it advisable to quote at some length, from this leading case, as follows:

"It is insisted that the relator was the lowest, responsible bidder; that the word 'responsible' refers only to the pecuniary ability of the bidder to do the

work; that what is meant is financial responsibility, only; that when such financial responsibility of a bidder is ascertained or conceded, then the statute is mandatory, and the duty of the commissioner becomes imperative to award the contract to such a bidder, and that such duty is ministerial. In our judgment, however, the term 'responsible' should not receive a construction so narrow and limited. In one sense the term is synonymous with 'accountable,' and means answerable, legally or morally, for the discharge of a duty, trust, debt, service or other obligation. In that sense a bidder entering into a contract becomes responsible for its fulfillment. But this was not the sense in which the term is employed. In the statute it was evidently used in its other sense—of ability to respond. In that sense 'responsible' means to be able to answer or respond in accordance with what is expected or demanded, and to discharge a claim or duty. The scope of the term depends upon the subject matter to which it is applied. If it is applied to a surety, or to the maker of a bond, note or other instrument to be satisfied or discharged by the payment of money, it means ability to discharge the obligation under which the party is thereby placed, by the payment of the sum of money. So far as such an obligation is concerned, financial ability makes a party responsible, and, perhaps on account of the frequency of such obligations, this is the sense in which it is most often used. But a party may be bound or obliged, by duty or contract, to meet and discharge claims and obligations other and different from the payment of money, such as a trust or the keeping of stipulations or conditions, and in such cases 'responsibility' means ability to perform or discharge what may be expected or demanded under the duty or contract. As applied to a bidder who proposes to undertake the performance of the stipulations and conditions of such a contract as this, we regard the term as including the ability to respond by the discharge of his obligations in accordance with what may be expected or demanded under the terms of the contract. It is not unreasonable to suppose that the intent of the statute was to limit competition to parties able to perform the conditions of the contract. Such ability is of great im-

portance to the city and the parties assessed to pay for the improvement. It is only by letting the contract to a bidder capable of performing it, that the full benefit and advantage sought to be derived from the improvement can be realized."

The phrase, "lowest responsible bidder," makes it incumbent upon the board or officer letting a contract or competitive bids to exercise official judgment and discretion in such letting and it has been held that the exercise of such discretion cannot be controlled or set aside by mandamus, where the notice of the letting reserved the right to reject any or all proposals and bids. *Kelly v. City of Chicago*, 62 Ill. 279; Note to case reported in 26 L. R. A. 707.

The proper exercise of such discretion is not reviewable by the courts. *Valley v. Ill. Tunnel Co.*, 178 Ill. App. 388; *Chatham v. Davis*, 182 Ill. App. 506; *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *Kelly v. City of Chicago*, *supra*; *People ex rel. v. Kent*, *supra*.

We may now give consideration to certain specific causes or reasons which have been held to justify the rejection of the lowest bid for another considered to be more responsible. Such rejection has been sustained in favor of one who complied with all the requirements of the statute, specifications, etc., *Roseker v. Wabash County Comrs.*, 88 Ind. 267; in favor of the better quality and utility of the thing offered, *Cleveland Fire Alarm Co. v. Metropolitan Fire Comrs.* (N. Y.), 55 Barb. 288, 292; one more accountable, able to discharge the obligations so as to save the city from pecuniary loss, *Gutta Percha Co. v. Stokely*, II Phila. 219-221.

The duty imposed upon the officer to award contracts to the "lowest responsible bidder" is not a mere ministerial one, but one that calls for the deliberate exercise

of judgment and discretion. In determining bids he should consider not merely the pecuniary ability to perform the contract but the one in point of skill, ability and integrity who is most likely to do faithful, conscientious work and fulfill the contract promptly, according to its letter and spirit. *Hoole v. Kinkend*, 16 Nev. 217, 220; *Interstate Vitrified Brick & Paving Co. v. Philadelphia*, 30 Atl. 383; *Douglas v. Commonwealth*, 108 Pac. 559.

If the action of the board or officer in the rejection of the lowest bid is not arbitrary and capricious and without reason, and is not due to fraud or favoritism, such action will be sustained. For instance, the rejection of a bid for the sole reason that the bidder operates a non-union shop or does not use the union label might be held as arbitrary and an improper discrimination. But the consideration that such bidder is not as well equipped to supply the materials to do the work, has not, and cannot, command the skilled labor necessary to the work, is subject to "labor troubles," strikes and probable consequent inability to perform his contract and save the city harmless financially and otherwise in the performance of the contract, and other considerations already mentioned might warrant the acceptance of the bid of union labor or a union plant as the lowest responsible bidder as against the "lowest bidder" who happened to be non-union.

Our opinion in the nature of the inquiry made is necessarily general and is perhaps written at length. We conclude with another quotation from the leading case of *People v. Kent*, 160 Ill. pages 660 and 662, viz.:

"It thus appears that the refusal of the defendant to award the contract was because, in the exercise of the judgment and discretion reposed in him by the statute and the ordinance, he concluded, from information and inquiry, that the materials customarily used and the workmanship exhibited by the relator in the

performance of the kind of work required were poor and unsatisfactory, and that it could not be expected that the relator in this instance would be able to meet and discharge the conditions and obligations of the contract in a satisfactory manner, and his conclusion was reached and the bid of the relator rejected in good faith and without any improper motive or fraud, under the terms of the stipulation, unless the rejection of the bid for such a reason could be deemed a fraud in law. * * * He was vested with the exercise of official judgment and discretion, with which, in the absence of fraud, courts have no right to interfere. (*Kelly v. City of Chicago*, 62 Ill. 279; *People ex rel. v. Dental Examiners*, 110 *id.* 180; *People ex rel. v. Mayor*, 25 Wend. 680; *People ex rel. v. Council of Troy*, 78 N. Y. 33.) In this case there was neither favoritism nor fraud as a matter of fact, and none is to be inferred as a matter of law."

(No. 6053—July 16, 1927—J. W. B.)

CITY EMPLOYEES, VACATION, FIRE ALARM OPERATORS.

Fire alarm operators, although Civil Service employees in the Fire service are not entitled to a 20 day vacation under section 1206 of the Municipal Code of 1922, for the reason that section 1155 of the Code fails to include them among the enumerated members of the Fire Department.

Hon. A. W. Goodrich, Fire Commissioner:

Replying to your communication of July 11th, requesting us to advise you as to whether or not Fire Alarm Operators employed in your department who are classified in the fire service by the Civil Service Commission are to be included among those members of your force who are entitled to a twenty-day vacation by virtue of an amendment to section 1206 of The Chicago Municipal Code of 1922, passed May 25, 1927, by the City Council, we beg to say that section 1206 reads as follows:

"The fire marshal shall have authority, and it shall be his duty, to grant a furlough of twenty days in each year with full pay to all officers and employes in the uniformed service of the fire department, and the fire marshal shall fix the time when such furlough shall be given in each case."

Section 1155 of the Chicago Municipal Code of 1922 provides as follows:

"The following members of the fire department, viz.: the fire marshal, the first assistant fire marshal, and all other assistant fire marshals, the drill master, and all chiefs of battalion, captains, lieutenants, firemen, fire engineers, assistant fire engineers, marine engineers and pilots shall constitute and be known as the uniformed service."

The City Council having specifically designated in section 1155 what members of your department are in the uniformed service, and that designation not having included those members of your department known as fire alarm operators, compels us to advise you that the fire alarm operators in your department are not entitled to claim the benefits of the vacation period as the same is fixed by the City Council for members of the uniformed service.

Section 1162 of The Chicago Municipal Code of 1922 provides that all subordinate officers and employees of the fire department that are not included in the uniformed service shall be subject to such rules and regulations as shall be prescribed by the fire commissioner or the ordinances of the City. There does not appear to be any ordinance of the City regulating the vacation of any of the employees of the fire department except those in the uniformed service, and, under the powers conferred upon you, it is my opinion that the question of the vacation period that should be allowed fire alarm operators is one solely for you to determine.

There is no ordinance making it mandatory upon you to grant members or employees of the fire department outside of those classified in the uniformed service any specific vacation period.

In our opinion, you may promulgate such rule or rules regulating the vacation period of the officers and employees of the fire department who are not classified in the uniformed service as you may deem proper.

(No. 6054—July 20, 1927—F. J. V.)

1 SALARIES AND WAGES, OVERTIME, GARBAGE HANDLERS.

A raise in pay of garbage handlers for overtime must be based upon ordinance and cannot be considered as a matter of mere policy. ○

2 SALARIES AND WAGES, OVERTIME.

City employees are not entitled to time and a half for overtime on the basis of an 8 hour day, except where there is an established scale of wages and hours on which a higher rate can be based for similar services.

Hon. Edward F. Moore, Deputy Commissioner of Public Works:

We have your request for an opinion "as to the governing rate of pay in the case of garbage handlers," together with enclosure of communication of E. Vollman, General Foreman, Reduction Works, Bureau of Waste Disposal, which states the facts upon which such opinion must be based.

It is stated that the "business representative of the Garbage Handlers Union has made request for double time for all overtime worked by his men."

Any official action taken in this matter must be governed by the existing ordinances of the City Council. The particular ordinance that applies is found in article XII, Hours of Labor, sections 3276 and 3277 of the Municipal Code of 1922, page 896, which is as follows:

“Eight hours shall constitute a legal day’s work upon all work performed under any contract entered into with the City of Chicago.

“Eight hours of labor between eight o’clock a. m. and five o’clock p. m. shall be and constitute a day’s work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments, or any department or workshop, where constant operation is necessary; provided, however, that in all cases of necessity or emergency, superintendents, foremen or others in authority are hereby authorized to work their employees such number of hours as such necessity or emergency may require; but for all labor performed in excess of eight hours in any one day, such laborer or employee shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed, except in those employments where there is an established scale of wages and hours which is usually and customarily paid for such excess time by employers generally within the city for like services, in which event such labor in excess of eight hours in one day shall be paid for according to the wage scale, hours and conditions so established.”

By the express terms of this ordinance it is clearly and unequivocally provided that “for all labor performed in excess of eight hours in any one day, such laborer or employee *shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed.*

This is decisively against the demand for double time for all overtime of the garbage handlers, unless their case may be construed to come within the stated exception to the above provision of the ordinance which is as follows: “Except in those employments where there is an

established scale of wages and hours which is usually and customarily paid for such excess time by employers generally within the City for like services."

There is nothing in the communication of the General Foreman of the Reduction Works or in your own letter which tends to bring the garbage handlers' employment within this stated exception.. Instead, these communications state the facts to be that the pay received by the garbage handlers is the same as that now paid to all other laborers at the Reduction Plant (except skilled mechanics), and to the laborers in the Water Pipe Extension Bureau, in the Construction Division of the Bureau of Engineering and in the Bureau of Streets.

It is our opinion that unless the facts warrant the placing of the garbage handlers within the exception of the ordinance, as above quoted, the granting of the demand for double pay for overtime would be illegal and improper without special authorization by an appropriate ordinance of the City Council. It is therefore erroneous to say, as stated in the General Foreman's communication, that "the question of paying double time for overtime is entirely a matter of policy." Any policy must have for its support the facts and the law. Any demand for pay for overtime that appears, as in this case, to be in conflict with the existing provision of the City ordinance must, of necessity, be addressed to the City Council; for this involves new legislation or amendment of the ordinance before a demand can lawfully be granted. Any other procedure would be illegal and unwarranted.

If the existing facts do not bring the garbage handlers employment within the exception to the ordinance, then it is governed by the express provision that their pay shall be "at the rate of time and one-half for all such labor

performed (overtime),'' and the garbage handlers' appeal for double pay for overtime must be addressed to the City Council.

(No. 6055—July 21, 1927—G. F. M.)

1 PENSIONS, OLD AND NEW RATES, COMPUTATION.

In computing pensions under an old rate and a new rate which has become effective after July 1st, the old rate is applied from the first of July to date of the Governor's approval of the new rate and the new rate is applied from the date of approval, both amounts making up the monthly pension.

2 LAWS, EFFECTIVE.

A bill passed by both houses prior to July 1st and signed by the Governor after that date becomes effective upon the Governor's approval of the Act.

*Mr. Daniel Mechtersheimer, Secretary, Retirement Board,
Policemen's Annuity and Benefit Fund:*

Complying with your request for an opinion as to the computation of checks for old law pensioners, in view of the recent legislation, the following is submitted:

At the last session of the Legislature, there was a bill passed known as Senate Bill 179, which provided a new schedule of amounts to be paid pensioners receiving pensions under former pension acts, a copy of which bill is in your possession. This bill was passed by both Houses of the Legislature prior to July 1, 1927, and was signed by the Governor on or about July 7, as I am informed.

Section 13 of article 4 of the Constitution of Illinois provides that no Act of the General Assembly shall take effect until the first day of July next after its passage, unless in case of emergency enactments.

Section 16 of article 5 of the Constitution provides that every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor, and if he approve, he shall sign it, and thereupon it shall become a law.

Our Supreme Court has held in the case of *Board of Education v. Morgan*, 316 Ill. 143, that as soon as a bill is signed by the Governor, it becomes a law, but that it does not become effective until the first day of July following its passage; that when a bill is passed prior to the first day of July and is not signed by the Governor until after the first day of July, it takes effect at the same time it becomes a law, that is upon the signing of the bill by the Governor.

In short, when a bill is passed by the two Houses of the General Assembly as a legislative act before the first day of July, and the Act is not signed by the Governor until after the first day of July, it becomes a law and takes effect when signed.

I am of the opinion that the legislative enactment known as Senate Bill 179 went into force and effect as a law on the date it was signed by the Governor; that in computing the amount of pensions to be paid pensioners receiving pensions under former Police Pension Acts it will be necessary for your office to compute the amount of pension due at the old rate of payment from the first of July up to the date the Governor signed the new Act, and to then compute the amount of pension under the new schedule contained in Senate Bill 179 from the date said bill was signed by the Governor up to the end of the month of July; that these two amounts added together will constitute the monthly pension payment of the respective pensioner for the month of July.

I would suggest that you communicate with the Secretary of State and ascertain the exact date upon which Senate Bill 179 was signed by the Governor in order that the payments made by your office will conform with the law.

I would also suggest that you forward a communication to the City Treasurer relative to the new pension checks for the month of July, explaining the system upon which the said checks were computed to the end that there will be a complete understanding as to the validity of the amounts set out in the respective checks.

(No. 6056—July 22, 1927—F. J. C.)

1 CONDEMNATION JUDGMENT, INTEREST, PAYMENT.

Interest upon a judgment of condemnation is payable out of the corporate fund where such interest is made a part of the judgment under an agreement that the award should bear interest after a certain date.

2 CONDEMNATION JUDGMENT, INTEREST.

The City is liable in interest on a judgment of condemnation if the judgment is not paid at the time of taking the property.

Hon. Charles C. Fitzmorris, City Comptroller:

Your letter of July 21, 1927, in reference to the payment of interest out of the Corporate Fund on a judgment in condemnation has been received by us, together with a letter from Mr. William H. Dillon and a copy of the letter of former Corporation Counsel Francis X. Busch.

It seems that heretofore some question has been raised as to the manner in which this interest should be paid and as to whether or not the interest could be paid out of the

Corporate Fund. From our examination of the files there is apparently no controversy as to the amount of interest due under the judgment rendered in the condemnation proceedings. There have been many cases passed upon by the Supreme Court of Illinois as to the question of a governmental agency being liable for interest on judgments in condemnation. This question was discussed at length in the case of *McCartney v. City of Chicago*, 273 Ill. at page 276. The court in this case at page 281 said:

“The next question relates to the amount of damages that may be recovered, and that is not a question which is affected in any manner by the form of action. The constitution provides that private property shall not be taken for public use without just compensation, and the question whether that provision required the payment of interest from the time that possession is taken for the public use has often been before the courts with uniform results. The correct rule was stated in *Appleton Water-Works Co. v. Railroad Commission*, 154 Wis. 121, Ann. Cas. 1915B, 1160, where the court said: ‘Just compensation for property presently taken must necessarily mean its present value presently paid. It cannot mean its present value to be paid two years in the future without interest. If payment is not to accompany the taking but is to be postponed to a later period it must certainly be upon the payment of interest for the deferred period.’

“In *Illinois and St. Louis Railroad Co. v. McClintock*, 68 Ill. 296, it was held that an award condemning lands for right of way under the act of 1852 bore interest where possession of the property condemned was taken and retained by the applicant for condemnation, and the court said that the question was settled in the case of *Cook v. South Park Comrs.*, 61 Ill. 115.

“In *City of Chicago v. Barbican*, 80 Ill. 482, it was held that the party seeking condemnation acquired no vested right until payment of the compensation, and the property owner has no vested right in the damages until the same are paid or deposited, and where the property condemned has not been taken the

award will not bear interest, but if by the owner's consent, expressed or implied, the property is taken before compensation is made the judgment will bear interest."

The question in this case seems to be decided against the City and creates a liability against the City for interest on judgments obtained in condemnation matters under certain conditions. While it is true that not in all cases the City is liable for interest, yet in this case it seems that there was a specific agreement which became part of the judgment that the award would bear interest after the dates specified for the payment of the award. In discussing the remedy of the person whose property is taken under condemnation, the courts have held that such interest may be recovered either in a suit in assumpsit or the payment may be compelled by a writ of mandamus.

It is our opinion, therefore, that after litigation is commenced there would be an ultimate recovery for the amount of interest claimed under the warrant issued by the Board of Local Improvements. If a judgment was obtained, as it no doubt would be in this case, then this interest would be payable out of the Corporate Fund; so that a refusal to pay out of the Corporate Fund in this particular case, and we are limiting our opinion to this particular case, would result in a situation where an additional expense would be incurred out of the Corporate Fund without any ultimate prospect of defeating this claim for interest in any legal proceeding which might be brought to enforce the demand.

We are therefore of the opinion that this interest can be legally paid, and ought to be paid, out of the five per cent which the Board of Local Improvements added to the assessment for the purpose of reimbursing the Cor-

porate Fund for sundry expenses. Under the judgment order the interest fixed became as much a part of the judgment as the cost itself.

(No. 6057—July 23, 1927—S. C. A.)

1 SIGNS, ZONING DISTRICT.

A sign which does not identify a building but is an advertisement is not permissible in a zoning district.

2 SIGN, RIGHT TO ERECT.

The right to erect a sign is a part of a property right of a business.

Hon. Christian P. Paschen, Commissioner of Buildings:

You have submitted to us a letter from Attorneys Taylor, Miller, Busch and Boyden, Attorneys for Club Casca Del Mar, in which letter said Club makes application for a permit to construct two wings to the existing sign on its property at South Shore Drive and East 74th Street. It appears that a permit was issued by your department in November, 1926, for the erection of a sign board on these premises 15 feet high and 30 feet long. The application for the present permit is to erect two wings, one at either end of the present sign board, each wing to be 30 feet long and 15 feet high. The question arises whether the erection of the original sign or the proposed additions thereto is in violation of any of the provisions of the Zoning Ordinance.

The property in question is in a district zoned for apartment uses. Under paragraph b of section 6 of the Ordinance "a private club excepting a club, the chief activity of which is a service customarily carried on as a business," may be erected in an apartment district. Section 7 of the

Ordinance provides that certain auxiliary uses in residence or apartment districts may be permitted. The Ordinance enumerates the following with reference to signs, which may be permitted under the auxiliary use:

“Signs not over 12 square feet in area advertising the premises for sale or for rent which are located (if space occupied by building does not prevent) not nearer to adjoining premises than 8 feet or nearer to a street line than the building line established by this ordinance.

“In a residence district on a lot occupied by a dwelling one sign only, which sign shall not exceed one square foot in area bearing the name or occupation of the occupancy of such dwelling place not nearer to the street than the building line established by this ordinance.

“A sign in an apartment district not over two square feet in area placed not nearer to the street than the building line established by this ordinance announcing the existence of an enterprise permitted on the premises.

“Public, charitable or religious institutions in residence or apartment districts may have a sign or bulletin board not over 12 square feet in area displaying the name or services therein provided. * * *

“(b) Auxiliary uses shall not include a bill board, sign board or advertising sign, store, trade, business, garage or stable except such as are hereinbefore specially permitted.”

The attorneys for the applicant cite the case of *Illinois Life Insurance Company v. City of Chicago*, 244 Ill. App. 185, as authority that the sign in question does not violate the Zoning Ordinance. In the Illinois Life case the question in issue was whether the Illinois Life Insurance Company had a right to erect upon its place of business a sign reading—“Home Office, Illinois Life Insurance Company, Greatest Illinois Company.”

The building of the Illinois Life Insurance Company was located in an apartment district. This building was erected prior to the passage of the Zoning Ordinance and thus, after the passage of the Ordinance constituted a non-conforming use. That building was originally designed to carry a sign identifying the building as the home office of the Illinois Life Insurance Company. However, the sign in question was not erected prior to the passage of the Zoning Ordinance, but was erected after the passage of the Ordinance. In that case the court said:

“We think that fairly and reasonably construed paragraph a of section 14 of the Zoning ordinance did not restrict the use of a building to such an extent that the building should remain precisely as it was when the Zoning ordinance was passed. In our view when paragraph a of section 14 provided that the non-conforming use of a building could be continued, it meant that the building could be used in connection with the business in such a manner as a building devoted to such business was customarily conducted. In our opinion the erection of the sign in question on the building of the complainant was one of the uses customarily employed and actually conducting the business which was authorized by paragraph a of section 14 to be continued, although it was a business designated by the ordinance as a non-conforming use.”

The court further said:

“The provisions of paragraph b of section 7 of the Zoning ordinance which provisions exclude from auxiliary uses billboards, signboards and advertising signs do not in our opinion apply to signs such as the one on the building of the complainant, but refer to billboards, signboards and advertising signs used for general advertising purposes.”

In our opinion the decision in the Illinois Life case does not apply to the facts in the present case. In that

case the court held that the owner of the building possessed the right to erect upon said building a sign identifying the building and identifying the business carried on in the building; that it is customary for owners of business buildings to so identify their buildings and that the owner of a building possesses the right to identify his building; that the right to erect the sign was a part of the property right of the business in which the complainant was engaged and the court in construing paragraph b of section 7 of the Zoning Ordinance says that the sign referred to therein "refers to billboards and signboards and advertising signs used for general advertising purposes."

In the present case it appears that this Club was organized in 1926 or subsequent to the passage of the Zoning Ordinance. Thus any property it may own was purchased subject to the provisions of the Zoning Ordinance. It does not appear that this Club is at present engaged in any business other than the business of increasing its membership or planning for its future building operations.

In our opinion the proposed sign in the following words: "Site of Club Casca Del Mar, To Be Completed and In Operation in 1928," partakes more of the nature of an advertising sign or of a drive for additional membership, and is that character of sign that is prohibited by the provisions of the Zoning Ordinance.

We, therefore, are of the opinion that the requested permit should not be issued.

(No. 6058—July 25, 1927—F. J. V.)

TRAFFIC POLICE, VEHICLE LICENSE FEES, USE OF.

Vehicle license fees and gasoline taxes are part of the state fund and as such cannot be used to pay for municipal government expenses such as the payment of the salaries of traffic policemen of the City of Chicago.

The City Council of the City of Chicago:

In compliance with an order of your Honorable Body made on the 13th instant, we beg leave to submit our opinion "In the Matter of the Use of State Funds for Payment of Traffic Police in the City of Chicago." The order appears in the Journal of Proceedings of July 13, 1927, page 817, and reads as follows:

"Ordered, That the Corporation Counsel be and he is hereby directed to advise this Council at its next meeting whether or not under the law it would be possible for the state departments having jurisdiction over the collection and expenditure of the state vehicle license fees and the gasoline tax to expend any portion of either of said funds for the employment of police officers to handle traffic in the City of Chicago, to the end that city police who are now detailed for that service and who are needed elsewhere might be released for general police work."

No State funds derived from taxation levied for purely state purposes could lawfully be diverted and applied to the cost of maintaining any municipal government in the exercise of its own powers, such as policing the traffic of its own streets. It is a general rule of constitutional law that public money may not be diverted from one fund to another. Thus a clause of section 17 of article IV of the Illinois Constitution places the following inhibition upon the power of the Legislature: "No money shall be diverted from any appropriation made for any purpose or taken from any fund whatever." The same rule applies to mu-

nicipalities, for what power the Legislature does not itself possess it cannot delegate to the City.

It becomes necessary, therefore, to inquire what is the purpose for which the vehicle license fees and gasoline tax are collected. By clause 96, section 1, article V, of the Cities and Villages Act the Council is empowered:

“To direct, license and control all wagons and other vehicles * * *, *the license fee when collected to be kept as a separate fund and used for paying the cost and expenses of street and alley improvement and repair.*” Smith-Hurd’s Stat., 1923, chap. 24, page 225.

The very same provision above italicized is contained in an act entitled “An Act to enable cities, towns and villages organized under any special law to regulate, license and control wagons and other vehicles,” approved June 28, 1913. Smith-Hurd’s Stat., 1923, chap. 24, par. 671, p. 325.

The Legislature at its last session enacted into law H. B. 499, known as the Arnold Bill, creating the so-called gasoline tax and provided that the amount collected from such tax shall be used for the improvement and repair of roads.

So it is that the expressed purpose for collecting vehicle license fees and gasoline tax is to improve and repair the roads. This purpose of the funds is entirely foreign to the purpose of maintaining the public peace and good order in policing the traffic in the streets of the City.

The fund realized from a tax for highways is usually required to be devoted to the particular purpose, and does not become part of the general fund of the municipality collecting it. *Elliott on Roads and Streets* (4th ed.), sec. 477.

It was held that the road tax levied and collected for a given year had to be applied to the payment of material

and labor for that year, and could not be applied to any other purpose, even the payment of prior indebtedness. *Commrs. of Highways v. Newall*, 80 Ill. 587.

We are therefore of the opinion that, under the law, it would not be possible for the State departments having jurisdiction over the collection and expenditure of the State vehicle license fees and the gasoline tax to expend any portion of either of said funds for the employment of police officers to handle traffic in the City of Chicago.

(No. 6059—July 25, 1927—F. J. C.)

1 DEDICATION OR CONVEYANCE, SCHOOL PROPERTY.

The conveyance or the dedication of school property cannot be made by the City of Chicago without a request of the Board of Education made by at least three-fourths of its full membership.

2 DEDICATION PLAT, SIGNATURE.

A dedication plat for the conveyance of school property for street and alley purposes must be executed by the "City of Chicago in Trust for Schools" and signed by the Mayor and the City Clerk.

Hon. Charles C. Fitzmorris, Comptroller:

We are in receipt of your letter of July 20th to which is attached copy of an Ordinance passed June 15, 1927, appearing at page 457 of the Council Proceedings of that date, which Ordinance provides for the dedication of certain school property at 104th and Wallace streets for street and alley purposes.

In your letter you ask us to advise you as to whether or not there is any legal question as to the authority of the Mayor and City Clerk to execute plat of dedication as provided in the Ordinance of June 15th and if such plat

can be made, should it be signed "City of Chicago in Trust for Schools, by Mayor and City Clerk."

In reply thereto we beg to inform you that section 132, chapter 122 Smith-Hurd's Statutes for 1925 at page 2329 provides as follows:

"The board of education may acquire, by purchase, condemnation or otherwise, real estate for any and all school purposes. Condemnation proceedings for the purpose of acquiring such property shall be conducted in the name of the city, in trust for the use of schools. The title to all real estate held for the use and benefit of the schools shall be held in the name of the city, in trust for the use of schools. All conveyances of real estate shall be made to the city in trust for the use of schools."

Section 133 appearing on the same page, provides as follows:

"The board of education may rent buildings, rooms and grounds for the use of schools or for the purpose of school administration. The board shall have the power to let school property on leasehold for a term of not longer than ninety-nine years from the date of the granting of the lease; but it shall not make or renew any lease for a term longer than ten years; nor alter the provisions of any lease heretofore or hereafter made whose unexpired term may exceed ten years, without the vote of two-thirds of the full membership of the board. No sale of real estate, or interest therein, used for school purposes or held in trust for schools shall be made except by the city council, upon the written request of the board of education, which shall have ordered said request by a vote of not less than three-fourths of its full membership." As amended by act approved April 20, 1917, Laws 1917, p. 723.

According to the language of section 132 it is apparent that the title to all real estate held for the use and benefit of the schools shall be held in the name of the City in

trust for the use of schools, and that all conveyances of real estate shall be made to the City in trust for the use of schools. It is apparent from this language that a conveyance of property for school purposes must make such conveyance to the City in trust for the use of schools. Therefore, in order to re-convey such property and to conform to the language of the Statute it would be necessary to have any plat or conveyance of any character of school property signed "City of Chicago in Trust for Schools, by the Mayor and the City Clerk."

In the case of *Elston v. Comstock*, 150 Ill., page 303, the court in construing the effect of a dedication of property by plat, said, "a dedication of property is in the nature of a conveyance for the purpose of the use."

In the case of *Crotty v. Effler*, 60 W. Va. 258, 264, 54 S. E. 345, 347, the court in defining the word "sale" in reference to real estate said, "the words 'sale' and 'conveyance' when applied to real estate are in common parlance in judicial decisions and by law writers used interchangeably, and a deed of conveyance of real estate therefore answers and refers to a sale of real estate."

Our Supreme Court has held repeatedly that when a plat is executed, acknowledged and recorded in conformity with the provisions of the Statute, it will operate as effectually as a deed to convey the title to the street mentioned therein in the municipality.

In the case of *Corbin v. B. & O. T. R. R. Co.*, 285 Ill. 439, at page 443 and 444, the court said, "The plat conformed in every way to the statute in the particulars just named and is therefore a statutory plat. The acknowledging and recording of the same in conformity with the provisions of the statute, as aforesaid, operate effectually as a deed to convey the title to the streets and alleys

therein mentioned to the City of Chicago, and that title remained in the City, as to the strip or part of the alley in question, until it was vacated by the execution of the vacation piece, on November 14, 1913, and which was introduced in evidence by appellant." *Woolacott v. City of Chicago*, 187 Ill. 504.

In this connection we might state that the same rule was laid down in the case of *Maywood Co. v. Village of Maywood*, 118 Ill. 61. See also *Rees v. City of Chicago*, 38 Ill. 322.

In construing the above sections it might be said that the dedication of the strip of land described in the ordinance for street purposes is not what would legally be termed a sale. It is, however, a disposition or conveyance of an interest in real estate to the public.

We are, therefore, of the opinion that the Statute creates legal power in the City Council to make such a dedication and at the same time confers power on it to designate how such conveyance may be made. The authority in the Ordinance of June 15th to the Mayor and the City Clerk are specific to enable the Mayor and the City Clerk to execute the plat of dedication or conveyance, dedicating the property described in the Ordinance for the street and the alley described therein.

You will note that the Statute provides that no sale of real estate or interest therein used for school purposes or held in trust for schools shall be made except by the City Council upon the written request of the Board of Education which shall have ordered such request by a vote of not less than three-fourths ($\frac{3}{4}$) of its membership. We have no information as to whether or not the Board of Education acted in conformity with the Statute in making the request for the conveyance of this particular lot of land

for the purposes stated in the Ordinance. We assume that the recital in the Ordinance of June 15, 1927, that the action was approved by the Board of Education on March 23, 1927, is a correct statement of the record. It might be well, however, to verify the record to ascertain whether or not three-fourths ($\frac{3}{4}$) of the membership of the Board of Education made this request to the City Council.

We are of the further opinion that it will be necessary to execute this plat in the name of the City of Chicago in trust for the use of schools and that such plat should contain a reference to the records of the School Board as to their action in making this dedication, and a reference to the Ordinance of the City of Chicago authorizing the making and signing of the plat.

(No. 6060—July 25, 1927—J. G. D.)

1 HARBORS, DOCK LINE, ESTABLISHMENT.

A dock line can be established only on the recommendation of the Harbor Division in pursuance of an ordinance approved by the City and Federal authorities.

2 RIPARIAN RIGHTS, EROSIONS.

Land eaten away by erosion is lost to the owner.

Hon. Richard W. Wolfe, Commissioner of Public Works:

I have before me your letter of July 11th to the Corporation Counsel. The blue print attached to the file, which is returned herewith, would indicate that the Harbor Division of the City recommended that a certain dock line be established about October, 1910. It appears from the correspondence that this dock line was only recommended and that no action was taken by the City Council for the purpose of establishing this dock line as recom-

mended. It would seem that later, when condemnation proceedings were had by the Board of Local Improvements in relation to the Ashland Avenue Bridge across the river, that Messrs. Holland and Sheehan, who represented the Board of Local Improvements, advised Mark Levy & Brother that they would recommend to the City of Chicago that the dock line recommended by the Harbor Division in 1910 be established. The order entered by the court in this Ashland Avenue proceeding does not mention any such suggestion. I judge, however, from the correspondence, and especially from the letter of Mr. Sheehan, of date March 26, 1927, that this proposition of Messrs. Sheehan and Holland to make this recommendation may have had some influence in enabling them to make the settlement that was made by Mark Levy & Brother. But it is for the City Council to decide whether or not their recommendation shall be favorably acted upon and the harbor line established as suggested in 1910, subject, of course, to the approval of the State and United States Government authorities.

I have just had a conference with Mr. M. W. Oettershagen, registered structural engineer and engineer of the Bureau of Rivers and Harbors of the City, and he advises me that the erosion of the river at this point is, as indicated upon the map, something like thirty feet, and that the Chicago River, at full width at this point, is treated as part of the harbor of the City.

You will observe from your letter of January 11th that the present condition is "due to the natural erosion of the river bank, the actual edge of water is considerably landward from the recommended dock line" of 1910.

Erosion is the gradual eating away of the soil by the operation of currents or tides, and the proprietorship of land thus taken away is lost to the owner. American &

English Encyclopedia of Law, Volume 6, p. 809; *Mulry v. Norton et al.*, 100 N. Y. 424-433.

In the light of these facts and the law above referred to, the dock line cannot be established on the line recommended by the Harbor Division in 1910 without action on the part of the City Council of the City of Chicago, thereafter approved by the State and United States authorities.

Blue print and enclosures are returned herewith with the recommendation that this matter be taken up by Mark Levy & Brother with the City Council if any action is desired by them in the matter.

(No. 6061—July 27, 1927—F. J. C.)

1 SIDEWALKS, STREETS AND ALLEYS, BOOT BLACKING ORDINANCE.

Shoe-shining upon the streets, alleys and sidewalks of the City of Chicago is permissible if temporary, but not at a fixed place or stand; and an ordinance authorizing such a stand would be invalid.

2 SIDEWALKS, STREETS AND ALLEYS, LICENSE.

Ordinarily, nothing can be done on the streets and alleys or sidewalks of the City of Chicago in the absence of a permit under ordinance, especially when it would amount to an obstruction of the thoroughfare.

Hon. Michael Hughes, Superintendent of Police:

We are in receipt of your letter of July 26, 1927, to which is attached copy of a letter from Scherwat & Leaton, signed by Mr. Leaton, dated July 21, 1927, and in which certain inquiries are made with reference to "America's Bootblacks," a corporation organized for the purpose of shining shoes and auxiliary lines in different buildings in the loop.

In their letter these attorneys ask if it would be a violation of any ordinance if occasionally one of their bootblacks stopped along the streets and shined shoes, and could he be sent out upon the street to work the street on a roving commission with a license or permit, or without a license or permit; and could permits or licenses be had for boys operating as bootblacks at fixed places on the streets.

In reply thereto we desire to say, it has been the opinion of this office for many years that in the absence of an express provision of an ordinance authorizing certain things to be done on the streets, then such things cannot be done. We find no provision in the ordinances by which any city official is authorized to grant a permit to any person to carry on the business of bootblacking on the streets, but we find an expressed provision in the ordinance at page 1034 of the Chicago Municipal Code of 1922 under sections 3735 and 3736 in which is provided:

“It shall be unlawful for any person, firm or corporation to erect, place or maintain in, upon or over any street, alley, sidewalk or other public place in the city of Chicago any fruit stand, lunch stand, lunch wagon, flower stand, bulletin board, trough for feeding horses, or any table, box, bin, rack, showcase, platform, or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for same shall be obtained from the commissioner of public works; provided, that the commissioner of public works shall not grant such permit, except for the purpose of exhibiting for sale daily newspapers, within the district bounded on the north by the Chicago River, on the south by the north side of Van Buren street, on the east by Lake Michigan and on the west by the Chicago River.

“It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, or solicit any other person to purchase, any article whatsoever,

except daily newspapers, on any street, alley or public place in the city within the district bounded on the north by the Chicago River, on the south by the north side of Van Buren street, on the east by Lake Michigan and on the west by the Chicago River; provided, that the mayor may, in his discretion, issue temporary permits to street vendors authorizing them to make sales in said district between the fifteenth day of December and the twenty-fifth day of December of each year."

It will be seen from the provisions of this ordinance that no business of any character for the sale of goods and merchandise or for the pursuit of any occupation whatsoever shall be allowed on any street, alley or sidewalk, unless a permit for the same shall first be obtained from the Commissioner of Public Works.

While it might be legal and valid for the proper authority to issue a license or permit allowing these boys to go out on the streets to work in their occupation, where such work would be of a temporary character, and where the work would not be done at one place, yet it is our opinion that the City would have no power in the absence of expressed authority from the City Council to allow these boys to operate at a fixed place upon the street. In fact, it is our opinion that the allowing of a fixed stand upon the street by the City would be in violation of the duty fixed by the Statute in relation to the City keeping streets free and clear of obstruction.

There are many cases in this State which define and fix the rights of the City as those rights have application to the administering of the duties of the City in reference to the streets. It has been the universal rule in all of these decisions that the City has no right to allow an obstruction of a permanent character which materially encroaches upon the public streets and impedes travel or

in any way restrains the use of the street for travel by the public. In the case of the *People v. Harris*, in the 203d Ill., page 272, at pages 279 and 280, the court says:

“When a public highway is once established, all the beneficial uses of it vest in and devolve upon the public, and where, as incorporated cities, the title of the streets is vested in the municipality, they are nevertheless charged with the public right, in fact, the city could have no authority to accept public streets upon any other conditions than that they should be for public use, and what is meant by public use the ground or foundation to travel upon, (which peded and unobstructed use of every portion and part of said public highway,—not only that they may use the ground or foundation to travel upon, (which right is co-extensive with every inch or foot of it), but that they may enjoy the air, light and rainfall as well upon every portion of it. * * * ‘The title of streets is vested in the City, and it has the conservation, control, management and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The City has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like. * * * The rule is, that all public highways, from side to side and from end to end, are held for the use of the public, and no other safe rule can be adopted.’ ”

The rule in the case above cited has been followed in many cases.

We are, therefore, of the opinion that it would be an invalid act on the part of the City to authorize the erection and maintenance of stands for the boys to operate at a fixed place upon any of the streets.

You will note, also, that where the power is given in the ordinance to the Commissioner of Public Works to grant permits, that such power is limited to territory outside of

the district bounded on the north by the Chicago River, on the south by Van Buren street, on the east by Lake Michigan and the west by the Chicago River, and that in such territory so described he can only issue permits for the erection of stands for the sale of newspapers within that district. So that under this Ordinance no permit could be issued to these boys to shine shoes on the streets at any point within that territory.

(No. 6062—July 28, 1927—F. J. C.)

1 STREETS AND ALLEYS, PAVING, METHODS.

The paving of a street or alley in the City of Chicago may be done in two ways; first, under ordinance levying a special assessment; second, under a contract with a private contractor upon permit from Commissioner of Public Works and superintended by the Board of Local Improvements.

2 SPECIAL ASSESSMENTS, ALLEYS.

The owner of an alley properly paved under private contract is not assessable.

Mrs. Claudie H. Capps, Blair, Nebraska:

We are in receipt of your letter of recent date relative to the paving of an alley adjacent to your property between 65th and 66th streets, the east and west streets, and South Troy street and Albany avenue, the north and south streets. We have made an investigation of the situation as it relates to the alley in question. We find that a petition was filed for the paving of this alley with the Board of Local Improvements by a private contractor by the name of Anderson. That this petition contained the names of various property owners whose property adjoins this alley. We do not find that you signed this petition, but we do find that a permit was issued to pave this alley by the Board of Local Improvements.

For your information there are two methods by which a street or alley may be paved in the City of Chicago; one is by the levying of a special assessment by ordinance by the City Council, to be executed by the Board of Local Improvements; the other is by the property owners entering into a contract with a private contractor to do the work under a permit issued by the Commissioner of Public Works and superintended by the Board of Local Improvements. The Board of Local Improvements make the specifications as to the material and the work done by the private contractor and only exercise supervisory control over the work and the material. The payments under the private contract are made to the contractor and are not collected as a tax on the property by the City Collector or by the County Treasurer.

In your case it would seem that the question of payment is a matter between you and the contractor who did the work. We have no information as to the manner or method by which this contractor obtained the consents of the property owners to make this improvement, but it is in apparent conformity with the law, otherwise a permit would not have been issued for this contractor to do the work.

We are not in a position to advise you as to whether or not you are liable under the contract for the amount of money that you state the contractor is trying to collect from you for the performance of this work. We would advise that you take this matter up with the contractor or with your lawyer here in Chicago so that you may be able to either make a proper adjustment or a defense in case the contractor brings suit against you for the amount of money that he claims.

You make inquiry as to how you can pay the amount involved so that at a later date the City may not assess

you for this amount. We would say that where this work is properly done and approved by the City, the City would not again assess this property and could not again assess this property, and that a payment to the contractor would be a final discharge of your obligation in the matter, if you decide to make this payment without litigation.

(No. 6063—August 1, 1927—S. C. A.)

LICENSES, EX-SERVICE MEN.

Ex-service men personally or their widows are entitled under City ordinance to free permits to vend, hawk and peddle goods or merchandise upon presentation of an honorable discharge from military service.

Hon. Patrick Sheridan Smith, City Clerk:

You have inquired whether former soldiers and sailors are permitted to sell articles of food, such as sandwiches, red hots and hot tomares, etc., under free licenses or permits granted by you. Section 2929 of the Revised Municipal Code of Chicago is as follows:

“The city clerk is hereby authorized and empowered to grant temporary permits without the payment of permit or license fees, for a period of time not to exceed sixty days, to all former soldiers and sailors of the United States or of the State of Illinois, honorably discharged from the military or marine service of the United States or of the State of Illinois and to the widows of such soldiers and sailors, to sell milk or cream from stores, or to vend, hawk and peddle goods, wares, fruits or merchandise not prohibited by law; provided, that such permits shall be issued only upon the applicant's presenting his certificate of honorable discharge from the military or marine service of the United States or of the State of Illinois, or, in the case of widows, proof of their identity. It shall

be the duty of persons holding such permits to have, at all times, at their places of business, or in their possession when peddling, their discharge papers from the military or marine service, or proof of their identity, as aforesaid."

Section 626 of Cahill's Statutes of 1923 is as follows:

"On and after the passage of this Act, all former soldiers and sailors of the United States, or of the State of Illinois, honorably discharged from the military, naval or marine service of the United States, or of the State of Illinois, including former soldiers and sailors of the World War, shall be permitted to vend, hawk and peddle goods, wares, fruits or merchandise, not prohibited by law, in any county, town, village, incorporated city or municipality, within this State, without a license: Provided, said soldier or sailor is engaged in the vending, hawking or peddling of said goods, wares, fruits or merchandise, for himself only."

In the case of *Village of Lake Zurich v. Deschauer*, Appellate Court, 2nd District, on October 4, 1924 (235 Ill. App. 628 Abst.), in passing upon the validity of an ordinance of the Village of Lake Zurich regulating and licensing ice cream parlors and stands, soft drink parlors and stands and coffee houses and stands, said:

"It is next insisted by the plaintiffs in error that the court erred in denying them the benefit of the statute exempting honorably discharged soldiers of the World War from paying a license tax. The evidence shows that the plaintiffs in error are partners and engaged in a permanent business in an ordinary store building, running in connection with that business an ice cream parlor during a certain season of the year. The act relied upon by plaintiffs in error was adopted in 1901, and applied to ex-union soldiers and sailors, honorably discharged from the military or marine service of the United States. The act was amended in 1921, so as to include all soldiers of all wars. The question presented involves the construction of

the two sections of the statute relating to vending, hawking and peddling by honorably discharged soldiers. It was the intention of the law-making body to permit those who had done military service for their country, or State, to hawk and peddle without being required to pay a license for so doing. The legislature evidently did not have in mind to extend the exemption to those engaged in a permanent business, at a definite and fixed location. The language of the statute indicates that this legislation was for the purpose of exempting the soldier or sailor that was an itinerant hawker or peddler. We are not unmindful that the word 'vend' appears in the statute. It is in our judgment to be construed in connection with the words with which it is associated. The language of the statute is vend, hawk and peddle. According to the dictionaries, 'vend' means to sell, to offer for sale. 'Hawk' to cry or carry about for sale. 'Peddle' to travel about selling small wares. In accordance with the maxim, *noscitur a sociis*, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears."

Under the above statute and ordinance it becomes your duty when application is made to you by a former soldier, sailor or marine and upon the presentation of the honorable discharge of said soldier, sailor or marine, to grant to said applicant a permit or license without the payment of permit or license fee to vend, hawk and peddle any goods, wares, fruits or merchandise, the vending, hawking or peddling of which is not prohibited by law.

This does not apply to those who are engaged in a permanent business at a permanent or definite place of business; neither does it apply to one who is employed by another, but applies only to hawkers and peddlers as above defined and to those who are engaged in the business for themselves only.

As the business of peddling hot tomales, red hots, sandwiches, etc., is not prohibited by law, you should, upon compliance with the above conditions, grant a free permit for the peddling of the same to ex-soldiers or ex-sailors.

(No. 6064—August 8, 1927—G. F. M.)

PENSIONS, UNEXPENDED BALANCE, DISPOSITION.

Any unexpended balance remaining at the death of the last municipal annuitant should be refunded and paid without interest to the children of the deceased employee or to his legal heirs if there are no children.

Retirement Board, Municipal Employees' Annuity & Benefit Fund:

Replying to your request for an opinion in the matter of Vitty Sitty Lewis, the following is submitted:

Your letter states that James J. Lewis, a janitor employed by the Chicago Public Library and a contributor to your fund, died on October 12, 1926, leaving as his widow Mrs. Vitty Sitty Lewis; that she applied for a widow's annuity, which was granted to her, and that she died on April 5, 1927, leaving no minor or other children; that there are no known relatives of either James J. Lewis or Vity Sitty Lewis; that at the time of the death of the widow there remained an unexpended balance of his accumulated contributions to your fund in the amount of \$243.18, and that you desire to know what shall be done with the said balance.

Section 39 (E) of the Municipal Employees' Annuity & Benefit Fund Act provides that in any case in which an amount equal to the total amount accrued and credited to the account of a deceased municipal employee from sums

deducted from the salary of such municipal employee for annuity purposes, or otherwise paid by him according to law and applied to any Municipal Pension Fund described in the Act, shall not have been paid to such municipal employee and the widow of such municipal employee both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such contributions so paid in by him, and the entire amount paid in form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the children of such municipal employee, or in the absence of children, then to the heirs of such municipal employee according to the law pertaining to the estates of deceased persons.

There does not appear to be any provision in the law permitting this payment to be paid to the estate of Vitty Sitty Lewis or to her heirs, unless such heirs are also the heirs of James J. Lewis, the deceased municipal employee.

I am of the opinion that in the absence of any known heirs of James J. Lewis, the unexpended balance of his contributions remaining in the fund should be transferred to the Annuity Payment Fund to await possible claimants and later disposed of in accordance with the provision of section 56 (E) of the Act.

(No. 6065—August 9, 1927—G. F. M.)

PENSIONS, DISABILITY BENEFITS.

A policeman who is disabled as a result of any cause other than injury incurred in the performance of his duty is paid an ordinary disability benefit only after the first 30 days of the disability and may be carried on the payroll of the Police Department the first 30 days notwithstanding his illness or disability.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to the proper application of the amendment to Section 46 of the Policemen's Annuity and Benefit Fund Act relative to the payment of ordinary disability benefits, the following is submitted:

The Amendatory Act passed at the last session of the legislature provides that policemen who shall become disabled as a result of any cause other than injury incurred in the performance of any act or acts of duty shall have a right to receive "ordinary disability benefit" during any period or periods of any such disability exceeding thirty (30) days, and that no ordinary disability benefit shall be granted or paid for the first thirty (30) days of such disability, or any portion thereof.

This simply means that a policeman injured as stated is not entitled to be paid any ordinary disability benefits during any portion of the first thirty (30) days of his disability. If the Police Department sees fit to carry such disabled policeman on the payroll for the first thirty (30) days of his illness, that fact does not concern the Pension Fund any more than the fact that such policeman might be receiving health insurance or disability benefits from some lodge or society.

So far as the Pension Fund is concerned its liability to the disabled policeman becomes fixed thirty (30) days after

his disability begins, if the disability lasts so long, without regard to whether such policeman has been receiving any salary or relief from other sources or not. In other words, if a policeman has been disabled for thirty (30) days and continues under such disability, he becomes entitled to ordinary disability benefits as soon as the first thirty (30) days of such disability has expired.

(No. 6066—August 9, 1927—G. F. M.)

1 CIVIL SERVICE, APPLICATION, AMENDMENT AS TO AGE.

The original application for appointment as a police officer is a part of the records of the Civil Service Commission, and if the age of the applicant is incorrect or erroneously stated in the application it may be amended according to fact.

2 CIVIL SERVICE, RECORD, AMENDMENT.

Clerical errors in the record of the Civil Service Commission are correctable.

3 PENSIONS, CIVIL SERVICE RECORD.

The Retirement Board is bound by the Civil Service Commission records as to the age of a policeman.

4 POLICEMEN'S ANNUITY AND BENEFIT FUND ACT.

Section 59 does not prevent the Civil Service Commission from correcting an original application for appointment as police officer to conform with the actual facts as to the age of the applicant.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to whether or not the alteration by the Civil Service Commission of an original application for appointment to the Police Department would be binding on the Retirement Board, and therefore carry the possibility of affecting the annuity rights of any policeman whose application might be so altered, the following is submitted:

Section 59 of the Policemen's Annuity and Benefit Fund Act provides as follows:

“In the case of any policeman who shall have filed an application for appointment as a member of the Police Department of such City, the age stated in such application shall be conclusive evidence of the age of such policeman for the purposes of this Act.”

The Policemen's Annuity & Benefit Fund Act does not state that your Honorable Body must take the age of the applicant which was *originally* written in his application, but that you shall take the age “stated in the application.” The application filed with the Civil Service Commission is part of the records of the Civil Service Board, and the Civil Service Commission has the right to change its records to make them speak the truth. If the age originally stated by the applicant in his application is found to be incorrectly given or erroneously recorded and the Civil Service Commission corrects such application so as to have the same speak the truth, then your Honorable Body is obliged to take the age as finally stated in such application, since that is then the record of the Civil Service Commission.

(No. 6067—August 12, 1927—F. J. V.)

1 CIVIL SERVICE EMPLOYEES, FIRE ALARM AND TELEPHONE OPERATORS, DISABILITIES AND VACATIONS.

The disability status and rights of fire alarm and telephone operators as well as junior fire alarm operators is fixed by general ordinance—sections 1199 and 1200 of the Municipal Code; and the vacation privileges are governed by special annual vacation and sick leave ordinance provision.

2 ANNUAL VACATION ORDINANCE, SCOPE.

The annual vacation sick leave ordinance applies to such employees as are not provided for by the general ordinance.

3 MUNICIPAL CODE.

Section 1155 insofar as it provides for furlough privileges is limited to the "uniform service" and does not include fire alarm and telephone operators nor junior fire alarm operators.

4 WORDS AND PHRASES.

"Active members" of the Fire Department are those which constitute the uniform service. Fire alarm and telephone operators as well as junior fire alarm operators are not within such service.

Hon. A. W. Goodrich, Fire Commissioner:

We are complying with your request for an opinion "which will define the disability status of Fire Alarm Operators, Junior Fire Alarm Operators and Fire Telephone Operators." You state that the request is prompted by the contention of these employees "that inasmuch as they participate in the Firemen's Pension Fund they are "members of the Fire Department," and that as such they are entitled to the benefits and privileges outlined in section 1199 of the City Code, and are not, therefore, governed by the "Annual Vacation and Sick-Leave Ordinance."

Participation in the Firemen's Pension Fund does not necessarily establish the disability status of these employees, and it certainly does not give them any vacation privileges. Their status and rights in both these matters

must be determined upon a construction of chapter XXIX of the Municipal Code of 1922, which establishes the Fire Department, and the Ordinance of January 3, 1927 (Council Proceedings, p. 5096), both of which apply to the subjects of disability benefits and vacation privileges.

These employees are "members of the Fire Department" by virtue of section 1154 of said chapter XXIX, which is as follows:

"There is hereby established an executive department of the municipal government of the city, which shall be known as the Fire Department, and shall include a fire commissioner, fire marshal, * * * fire alarm operators * * * and employees as the city council may by ordinance provide."

In addition to the Fire Alarm Operators created by the general ordinance, the Council has since created by ordinance and the Civil Service Commission has classified the new positions of Junior Fire Alarm Operators and Fire Telephone Operators in the Fire Department.

Since these employees are expressly declared by the organization ordinance to be members of the Fire Department, their disability status is governed by Sections 1199 and 1200 of said ordinance (Municipal Code of 1922, p. 355). Section 1199 is as follows:

"Any member of the Fire Department receiving any injury or becoming disabled while in the discharge of his duties and by reason of or as a consequence of the performance of such duties so as to prevent him from attending to his duties as such member of the Fire Department, shall for the space of twelve months, provided his disability shall last that time, or for such portion of twelve months as such disability shall continue, receive his usual salary."

The disability status and rights of these employees, being expressly defined and provided for in the general ordi-

nance establishing their department, are not affected by the special annual ordinance which must be held to provide "vacation and sick-leave periods for city employees" for whom such provisions are not otherwise made by the general department ordinances.

Although your request limits our opinion to the disability status of these employees, their stated contention "that they are not included in the groups of city employees whose disability status, benefits and privileges are prescribed and defined in the annual 'vacation and sick-leave ordinance' cannot prevail, otherwise they would have no provision for their vacation at all." Although these employees are members of the Fire Department and their disability status is fixed by the general ordinance (City Code, 1922, p. 348), such ordinance makes no provision whatever for any vacation privilege.

Section 1155 of said ordinance creates in the Fire Department what is denominated "uniformed service" and section 1206 provides furloughs for the members of this uniformed service. Since specific provision is made by this ordinance exclusively for members of this uniformed service, all other members of the Fire Department, by the principle of exclusion have no such furlough privileges and we must therefore look to the annual ordinance for such a provision for the benefit of the Fire Alarm Operators, Junior Fire Alarm Operators and Fire Telephone Operators.

As already indicated, this annual ordinance applies to such city employees as are not provided for by the general ordinances. The last paragraph of this annual ordinance specifically provides "that there shall be exempt from the effect and operation of this order, the executives of the Board of Education, Public Library, Municipal Tuberculosis Sanitarium, Law Department and all active mem-

bers of the Department of Police and the Fire Department."

It is clear that only the *active members* of the Fire Department are exempted from this annual vacation ordinance. The active members of the Fire Department are those constituting the uniformed service and they are expressly exempted because section 1206 of the general ordinance provides for their vacation privileges.

The classification by the Civil Service Commission of the positions in the Fire Department is as follows:

"Fire service, embracing positions in the *active* ranks of the Fire Department and positions directly related to the performance of fire duty." Rule 1, branch IV, class T, page 17 of Rules.

The distinction between those in the active ranks and those performing duties merely related to the active service is fully set out in an opinion rendered by this department defining similar lines of service in the Police Department. By that opinion the line of service to which these employees belong is service related to the performance of duty, and not active service. Opinions of Corporation Counsel, 1924-1925, pp. 480, 481.

For the reasons that Fire Alarm Operators, Junior Fire Alarm Operators and Fire Telephone Operators are not in the active service in the Fire Department, and that no furlough or vacation privilege is provided for them by the general ordinance, and that only the active members of the Fire Department are exempted from the provisions of the annual vacation ordinance, the vacation privileges of these employees are necessarily governed by the annual vacation ordinance, while their disability status is governed by the general ordinance.

(No. 6068—August 12, 1937—G. F. M.)

1 PENSION FUNDS, INVESTMENT, WATER CERTIFICATES.

Water certificates of other cities which restrict payment to the water fund itself, create no corporate indebtedness and are not of the class of securities in which pension funds should be invested.

2 MUNICIPAL PENSION FUNDS, INVESTMENT.

Municipal pension funds may be invested in interest bearing bonds of the United States, State of Illinois, or any county, city, village, incorporated town, municipal corporation or school district in the State of Illinois, or in any special assessment bonds of any Illinois city, village or town.

Retirement Board, Municipal Employees' Annuity & Benefit Fund:

Replying to your request for an opinion as to the investment of pension moneys in Harvey, Illinois, 5 per cent Water Fund Certificates, the following is submitted:

Section 6 (e) of the Municipal Employees' Annuity and Benefit Fund Act authorizes your Honorable Body to invest the moneys of the Municipal Employees' Annuity and Benefit Fund in interest bearing bonds of the United States, State of Illinois, or of any County, City, Village, incorporated town, municipal corporation or school district in the State of Illinois, or in certain special assessment bonds issued by any city, village or incorporated town in Illinois.

The Ordinance of the City of Harvey, Illinois, under which the water certificates in question were issued, provides in Section 3 thereof as follows:

"Said Water Fund Certificates shall be limited in their payment solely to the water fund hereinafter provided for, and shall not, nor shall the purchase and acquisition of said distribution system, in pursuance of this Ordinance, be held or construed to create any indebtedness of any kind or character, of or against

said City, except as and to the extent in said certificates provided; provided, however, that the City shall have the right but shall not be obligated to pay principal or interest out of any other available fund."

The certificates themselves, referred to in the above extract from the Ordinance, provide as follows:

"Know All Men By These Presents, That the City of Harvey, in the County of Cook and State of Illinois, acknowledges itself to owe, and for value received, promises to pay to the bearer hereof, on the 15th day of September, 19..., solely out of the water fund provided for in the Ordinance hereinafter mentioned, the sum of \$1,000.00," etc.

It is very apparent that by virtue of the Ordinance authorizing the issuance of these water certificates, no obligation for the payment of the same is assumed by the City of Harvey as a corporate debt, but said water certificates are limited in their payment solely to the water fund itself.

I am of the opinion that the above described water certificates do not fall within the category of "interest bearing bonds" of the City of Harvey, or in the category of "special assessment bonds" issued by the City of Harvey, and do not constitute one of the class of securities in which your Honorable Body is empowered to invest the moneys of the Fund under your control.

(No. 6069—August 15, 1927—F. A. W.)

CLAIM FOR DAMAGES, NEGLIGENT EMPLOYEES, LIABILITY.

The City is not liable for the negligent acts of officers and employees while in the discharge of their duty, so that damages caused to an automobile by being struck by a City's fire truck cannot be recovered from the City.

Mr. Henry A. Blair, 2400 S. Michigan Ave., Chicago, Illinois:

This is a reply to your recent letter in regard to the claim of W. H. Johnson, 6416 Parnell avenue, for damage to his automobile which was struck by fire truck of the City Fire Department on April 7, 1927, at Austin avenue and Robey streets.

Irrespective of actual responsibility for this accident, in our opinion the City of Chicago is not legally liable. The law is well established, that "municipal corporations are not liable for the negligent acts of the officers or men employed in their Fire Department while in the discharge of their duty." *Wilcox v. City of Chicago*, 107 Ill. 334.

We, therefore, are compelled to decline the claim of your client.

(No. 6070—August 17, 1927—L. H.)

1 FRONTAGE CONSENT, SHAVINGS, SAWDUST AND EXCELSIOR.

In determining the amount of frontage consent necessary for permission to establish a place for storing shavings, sawdust or excelsior, the applicant's own property may be included in the total of two-thirds of frontage consents on both sides of all streets surrounding the block in which the building or place is to be located.

2 WORDS AND PHRASES.

"Block" means a square of territory bounded by four streets.

Mr. John Touhey, Acting Chief, Bureau of Fire Prevention:

Your letter requesting an opinion regarding the provisions of section 1520 of The Chicago Municipal Code of 1922, requiring frontage consents for a building for sawdust and shavings with a capacity of over twenty tons, was referred to the writer for consideration and reply.

You state that it is proposed to locate a sawdust storage plant on the north side of 50th street between California avenue and Rockwell street; that the north side of the square was formerly known as 49th street, but that there is now no street there and what was formerly the street is taken up with railroad property. You ask first whether the term "block," as used in said section 1520, means the area bounded on the north by 48th street or by the railroad right-of-way which you designated as "formerly 49th street." In addition to this you ask whether the frontage of the site is to be included in determining the frontage consents required.

The part of section 1520 involved in your inquiries reads as follows:

"It shall be unlawful for any person, firm or corporation to keep, pile, store or accumulate, within

the city, shavings, sawdust or excelsior in any quantity exceeding twenty thousand pounds, unless such person, firm or corporation shall first submit to the chief of fire prevention and public safety the written consents of the owners of two-thirds of the frontage on both sides of all the streets surrounding the block in which is located the building or place where it is proposed to keep, pile, store or accumulate such shavings, sawdust or excelsior."

An examination of the City's maps would seem to indicate that the particular property on which the right-of-way is located has never been subdivided and platted, and there is nothing on these maps that indicates that the City had ever assumed jurisdiction over what you say was "formerly 49th street." Such being the case, we cannot regard the presence of the railroad as an indication that a street had ever existed or that it was the intention of the City authorities at any time to treat the area bounded on the north by the right-of-way as a city block.

There is some authority for saying that an interpretation of the word "block" so as to include an unreasonably large area, far beyond the amount usually included therein, renders such a provision, either discriminatory or meaningless. (*State of Louisiana v. Deffes*, 44 La. Ann. 164.) We do not think, however, that the principle laid down in that class of cases would apply in the present instance, where there is a provision for frontage consents that would become meaningless if the doctrine were applied, since no one could determine what would have to be treated as frontage. We are therefore inclined to regard the oft-repeated definition of a block as a "square" or territory bounded by streets as the proper one to apply in this case. For authority on this point see: *Harrison v. People ex rel. Boetter*, 195 Ill. 466; *Board of Councilmen v. Brislaw*, 126 Ky. 477; *Kochtitzky v. Herbst*, 160 Mo. 443.

In the Illinois case above cited (which was a frontage consent case), the court said: "The word 'block,' as used in the ordinance, is synonymous with the word 'square,' and means the territory bounded by four streets."

Hence, we beg to advise you that it will be proper to construe the word "block" as meaning the area bounded on the north by 48th street.

With respect to the second question you ask, there seems to be nothing in the ordinance in question or in any other ordinance now in effect which requires the exclusion of the applicant's own property in determining the frontage consent requirements. It will have to be included in computing the total frontage, and when the owner signs the frontage consent petition it will be proper to give the applicant due credit for it.

(No. 6071—August 18, 1927—L. H.)

1 APPROPRIATIONS, TRANSFER.

A two-thirds vote of the City Council is necessary under the Statute to transfer appropriations within a department; but there is no authority at present for moneys appropriated to one department to be transferred to another.

2 DEPARTMENTS, INTERCHANGE OF EMPLOYEES, COMPENSATION.

The employees of one department may perform services for another department by agreement between the heads of the respective departments with reference to the work done and the certification of the payroll by the department under which the employees are serving.

Hon. Christian P. Paschen, Commissioner of Buildings:

In your letter of recent date you call attention to the ordinance passed by the City Council at its last meeting by which the regulation of ventilation in new buildings

and the work of inspecting ventilation and plumbing was transferred from the Department of Health to the Department of Buildings. See Council Journal, July 25, 1927, pp. 963-965.

You state that the force now engaged in this work including the plan examiners, bureau chiefs and other heads under whose direction the force functions are now in the Department of Health; that the appropriation for the payment of salaries for all these employes is made to the Department of Health; that it is necessary in order to do this work in your department to have the force and the funds for their salaries transferred; and that you are anxious to take over the control of the work as per the requirements of the ordinance as soon as possible. You ask for advice as to your proper action in effecting such transfer.

It will not be possible at this time to transfer the appropriations made for the purpose indicated from one department to another. Section 2A of article VII of the Cities and Villages Act authorizes the City Council by a two-thirds vote to make transfers of appropriations within the Department, but there is no way of construing either the statutes or the ordinances so that such appropriations can be transferred from one department to another.

On the other hand there is nothing in the law which prohibits employees from functioning in one department and being paid by virtue of a payroll in another department. Inasmuch as the head of one department in such event certifies to work done in another department there will necessarily have to be some understanding and cooperation between the heads of the two departments in relation to the matter. Such cases have arisen heretofore but have usually involved only one or two employees. When this has happened the heads of the departments

always found a way of handling the situation by consent or agreement and no real difficulty presented itself.

In the present instance our recommendation is that if you desire to have this force physically transferred to your office it can be done by making the necessary arrangement with the Commissioner of Health, which arrangement should of course include an understanding as to the time and manner of certifying to the payroll containing these employees. When the appropriations for 1928 are made by the City Council the situation will adjust itself.

(No. 6072—August 19, 1927—F. J. V.)

1 FIRE COMMISSIONER, DISABLED FIREMEN.

It is the duty of the Fire Commissioner to report to the Pension Board for investigation all physically or mentally disabled firemen.

2 PENSION BOARD, DISABLED FIREMEN, RETIREMENT.

Firemen who have become physically or mentally disabled but who have not served continuously 20 years can be retired in the first instance only temporarily subject to at least yearly physical examinations and reinstatement. Firemen who have served 20 years and have become physically or mentally disabled may be permanently retired by preferring written charges before the Civil Service Commission.

3 PENSION BOARD, DISABLED FIREMEN, REINSTATEMENT.

Firemen who have recovered from their physical or mental disability must be restored to their former positions.

Hon. A. W. Goodrich, Fire Commissioner:

In a recent communication to us you submit the following statement upon which you request an opinion and our advice as to how to proceed to accomplish your aim, viz.:

“In the conduct of the Fire Department Drill School whereat all companies are required by the rules

of the department to attend at intervals for participation in drills, evolutions, practice and training, we find men in the various grades and ranks who are physically unable, due to age and other causes, to participate in drills, operate the pumping units or do the work prescribed by the rules and regulations of the department.

"This, in the opinion of the writer, is absolute indication that these men are physically unable or incompetent, or both, to perform active fire duty, and it is the desire and the intent to separate these men from the service according to law; and to make such separations *permanent* where in the judgment of a Medical Examiner these men, by reason of age particularly, have outlived their ability for active fire duty."

You request particularly that we "outline the action required for each" of the following classes, namely:

"(a) Those who have served more than 20 years and are more than 50 years of age and who are entitled to pension whenever they elect to apply for same.

"(b) Those who have served more than 20 years but who have not reached the age of 50 years as required for eligibility for pension.

"(c) Those who are over 50 years of age but who have not served 20 years in the department as required for eligibility for pension."

In your letter you stress the fact that "(you) are not including in this group those who are sick or disabled and for whom provision is made in section 1199 of the City Code."

In an opinion to the Fire Commissioner (Feby. 17, 1926, Opinions of Corporation Counsel, 1925-1926, p. 566) we said that "two classes of disabled firemen are recognized, one by the ordinance to whom regular salary must be paid, the other by the Pension Act to whom no salary

may be paid, but in lieu thereof must be paid the pension provided for."

The firemen to whom you refer come within the provisions of section 9 of the Firemen's Pension Fund Act (Cahill's Stat. 1923, par. 950, p. 497), which provides that "If any fireman of any such city while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board (of trustees) shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to his rank which he may have held in such service at the date of his retirement * * *."

This section plainly prescribes just what action must be taken in all the classes of cases you enumerate. In the case of every such fireman which is brought to the attention of the board of pension trustees, it becomes the duty of such board to retire such fireman from the service and place him on the pension list. In the face of such a specific provision in the law, nothing else can be done. It is an established rule of law that where a legal method is prescribed for doing a certain thing, that method must be adopted to the exclusion of all others. The first thing to be done by the Fire Commissioner, therefore, is to make specific report of each fireman's case for the action of the pension board.

This retirement of a fireman from active service is only temporary, however, for the same section 9, *supra*, provides that "If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal, or chief of the department of such city, who shall there-

upon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement."

That such retirement on account of disability is not to be permanent, and that it cannot be made the cause for a permanent retirement (discharge) in the case of a fireman who has not yet served 20 continuous years, clearly appears, we think, from the construction of the entire pension act. (Smith-Hurd's Stat., 1923, p. 376.) That the retirement of a fireman by order of the Board of Pension Trustees is not to continue indefinitely during such disability, is indicated in one of the specific powers granted to the board by section 5 of the Pension Act which reads as follows:

"Said board shall have power * * * (e) To require every fireman retired on account of disability to be examined at least once a year by a physician to be selected by the board, and to require said physician to report to the board the physical and mental condition of all such firemen examined by him."

This provision and that made by section 9 of the Pension Act for ordering the "reinstatement of such fireman in active service" in his former position if the "board shall become satisfied that such retired fireman has recovered from such physical or mental disability," are so clear and strong as to admit of but one conclusion of law, and that is that "if any fireman * * * while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service," such disability cannot be made the basis for his discharge from the department and the Civil Service, except perhaps where a fireman wilfully and for the purpose brings about his own disability. This applies to all firemen who have not yet served 20 years continuously regardless of their attained age.

We are of the opinion, however, that when a fireman has served 20 years his permanent retirement, from the service to the pension fund may be forced by charges duly preferred in writing before the Civil Service Commission under section 12 of the Civil Service Act, that such fireman is permanently disabled physically or mentally so as to make active service in the fire department practically impossible. We make this deduction from section 8 of the Pension Fund Act which provides that

“(First) Any fireman of any such city after having served twenty (20) years as a fireman, of which the last five (5) years shall be continuous, may retire from active service, and when such fireman shall have reached the age of fifty (50) years the board shall order and direct that such fireman shall be paid a (pension) * * *.”

“(Second) Any fireman of any such city, who, after having served twenty (20) years as a fireman, of which the last five (5) years shall be continuous, *shall be discharged from the fire service*, shall be entitled to the same benefits (pension) * * *.”

This conclusion of law that only those firemen can be permanently “separated” from the fire department and the civil service on the ground of physical or mental disability, who have served twenty (20) continuous years, does not operate to impair the morale or efficiency of the active fire service, for all such physically or mentally disabled firemen may at once be retired upon report and recommendation of the Fire Commissioner to the Board of Pension Trustees, examination by the Board’s physician, and order of the Board for such retirement. Such retirement may be immediately followed by the appointment of an eligible, to be selected first from the reinstatement list, if any, then from the original eligible list. Such appointment is temporary, subject to the reinstatement of such retired fireman (see Corporation Counsel’s Opinion

to you of date of June 9, 1927). But such appointment may become permanent, if, after attaining his twenty (20) years as a fireman, he should be discharged on account of such disability.

The spirit and letter of the Pension Act, *supra*, is to preserve the civil service status of the fireman until he becomes eligible to his pension, and therefore provides that physical and mental disability shall not become a sufficient cause for the permanent separation of such fireman from service until he has become eligible for pension. This also is in accord with the spirit of the Civil Service Act, and in this case the Pension Fund Act and the Civil Service Act must be construed together to determine the status and rights of the firemen as well as the powers and duties of the executive officers, the Fire Commissioner, Board of Pension Trustees and the Civil Service Commission.

The Supreme Court has declared that "the Civil Service Law is necessarily a part of the contract of employment of every civil service employee, and such an employee can only be discharged in the manner provided by section 15 of said Act." *People v. Coffin*, 282 Ill. 599, 610.

The Civil Service Commission alone has power to discharge such employee, and then only upon "written charges and after an opportunity to be heard in his own defense." *City of Chicago v. Luthardt*, 191 Ill. 516; *People ex rel. v. Stephenson*, 270 Ill. 569; *Jacobs v. Coffin*, *supra*.

Mere physical or mental disability of a fireman for active service is not a sufficient cause for charges and removal under section 12 of the Civil Service Act until such fireman has attained his twenty (20) years and can be permanently retired on pension.

(No. 6073—August 19, 1927—L. H.)

NORTH BRANCH OF CHICAGO RIVER, HOUSE BOATS.

Unlicensed boats in the north branch of the Chicago River may be removed as obstructions upon complaint made before the Municipal Court under the Ordinance of May 18, 1927.

Hon. John J. Hoellen, Alderman 47 Ward:

We are in receipt of your letter of recent date in which you ask for an opinion as to the City's jurisdiction over houseboats occupying space in the north branch of the Chicago River. You state also that the River Park Improvement Association has written to you that its members are desirous of having these houseboats moved from their neighborhood.

The status of this species of water craft, and the proper method of dealing with the objectionable situation that has arisen by reason of their anchoring in and obstructing the harbor has been the subject of considerable inquiry recently. In letters sent to the Commissioner of Public Works under dates of the third, eighteenth and twenty-fourth of February of this year, this department undertook to advise the Commissioner of Public Works in regard to the matter. The gist of our communications is as follows:

We showed, in our letter of February 3, 1927, that under the ordinances of the City the Harbor Master, acting as the subordinate of the Commissioner of Public Works, had as full control and authority over obstructions in the harbor as the Commissioner of Public Works has over streets, and could treat such craft as were tied up in the channel and interfered with navigation as nuisances. In fact, we referred to a case where a boat of this kind was taken out into the Lake and set adrift under instructions

from the Board of Public Works and the court sustained this action, holding that the boat was a public nuisance. *McLean v. Mathews*, 7 Ill. App. 599.

We pointed out, however, that in such cases the question of whether or not the boat constituted a nuisance was a question of fact, and therefore recommended prosecution through the State's Attorney under what is commonly known as the "Shanty Boat Act," passed June 10, 1897. (Cahill's Stat., 1925, p. 900.) Under this Act, it was made unlawful to use such a boat "as a residence, or for the purpose of engaging in business, trade or traffic, or for any purpose whatever" on any navigable water course without first obtaining a license from the clerk of the County Court.

An effort seems to have been made to prosecute under the law above mentioned, but apparently the results obtained were not satisfactory, since the Commissioner of Public Works later requested that an ordinance should be prepared which would give the City direct jurisdiction and enable it to proceed without invoking the State law. This was done, and on May 18, 1927, the ordinance was passed by the City Council. (See Council Journal, pp. 263-4.) Under the terms of this ordinance the City can prosecute in case the boat is not licensed by the clerk of the County Court. The licensing provision, being a part of the State law, could not be abrogated by ordinance, but it was assumed that the City authorities could measurably control the situation if the boats in question were not licensed.

We are not informed as to how effective this ordinance has been found, but believe that if parties are interested in having boats of the kind you speak of removed, they can secure action by filing complaints in the Municipal Court for violation of its provisions.

(No. 6074—August 22, 1927—F. J. V.)

CIVIL SERVICE POSITIONS, ABOLISHMENT.

The City Council alone has power in good faith to abolish a Civil Service position or office when the same becomes unnecessary or useless; a department head has no such power.

Hon. Christian P. Paschen, Commissioner of Buildings:

Complying with your recent request we are submitting our opinion in the matter of your inquiry, which is set forth in your communication as follows:

“The City Council passed an ordinance which appears on pages 963, 964 and 965 of the printed proceedings of the City Council for July 25, 1927, transferring the work of ventilation and plumbing inspection from the Department of Health to the Department of Buildings.

“In going over the list of the force now employed in that work I find that I may have to make a few changes in order to harmonize this work with the present work of the Building Department. I am not sure that the present method of organization for doing this work will be entirely to my liking; that is to say, I feel that I would like to be at liberty to make such changes as would enable me to carry on this work in what I think will be a proper and efficient manner and an improvement on present methods. This may involve the abolishment of certain positions and the creation of certain other positions.

“Will you kindly inform me what limitations will be placed upon me in making such changes?”

The provisions of the Civil Service Law must be substantially complied with when applicable. Considering first that the official action contemplated “may involve the abolishment of certain positions and the creation of certain other positions,” it is the law that the City Council alone has the power to create and abolish offices and positions in the Civil Service. The stability of positions held

by those in the Civil Service is so protected that even this power of the City Council is not absolute. The Supreme Court has said that:

“While the city has the right to actually and in good faith discontinue any position when the same becomes no longer necessary or useful, yet neither it nor the (Civil Service) Commission had any right to continue the position in force and to remove appellee until charges had been preferred against him and sustained by the Commission in the manner provided by section 12 of the Civil Service Law. (*City of Chicago v. Luthardt*, 191 Ill. 516.) Neither the City nor the Commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee. To permit such a course of conduct by the judgment of this court would be in effect, to declare the Civil Service Law a dead letter, a law enforceable only at the discretion of city officers whose duty, under the law, is to enforce it, or assist in enforcing it, according to its terms.” *People ex rel. v. Coffin*, 282 Ill. 599, 610.

It has been held that the head of a department has no discretion whatever as to the filling of a position when a vacancy occurs, but must immediately make requisition on the Civil Service Commission for the certification of an eligible and appoint the person so certified to fill the vacancy. *People ex rel. Roderick v. City*, 283 Ill. 462.

As an example of the limitation which the Civil Service Law places on the department head, the recent decision of the Appellate Court in the *Watters case* is instructive. By reason of the motorization of the fire department, fire engines and positions of fire engineers became unnecessary and obsolete. The Fire Commissioner sought to have these positions abolished or modified, but the City Council declined to take the necessary action. The Fire Commissioner refused to make further appointments to these posi-

tions and the Civil Service Commission refused to conduct an examination to create an eligible list from which appointments might be made. By the mandate of the Appellate Court the Civil Service Commission was compelled to hold an original examination to create an eligible list and the Fire Commissioner was compelled to fill all existing vacancies by appointment from such list. The Appellate Court said:

“If, then, these positions have been created by act of the City Council and there are vacancies therein, neither the Fire Commissioner nor the Civil Service Commissioners have power to decide whether or not it is necessary to fill these positions. They cannot abolish a position which the City Council has created by refusing to take the proper steps required by law to fill vacancies (citing cases).” *People ex rel. Watters v. Finn*, Ill. App. (1927); *People ex rel. Roderick v. City of Chicago, supra.*”

What we have said is intended in a general way to meet your request for information as to what limitation will be placed upon you in making changes in the bureau of ventilation and plumbing inspection, which was recently transferred to your department from the Department of Health, so as to “enable (you) to carry on this work in what (you) think will be a proper and efficient manner and an improvement on present methods.” Considering more particularly your situation and purpose we find that the City Council in the transfer ordinance which you cite makes no change in the number or character of the civil service operatives at present engaged in the work of inspecting building ventilation and plumbing. As the head of the building department, therefore, you have inherited all these employees who are regularly engaged in this work in their civil service character, and so long as these positions and places of employment remain in existence and

are appropriated for by the City Council you will have to keep and contend with them as they are, subject only to such reasonable modification in method of service rendered and such changes in the work actually assigned by you in the exercise of your power and duties as Commissioner of Buildings as may be consistent with the respective positions as created by the City Council and as classified by the Civil Service Commission. Such material changes in this new branch of your department as you suggest might be necessary and advisable, particularly the abolishing of any position and the creation of a new position, can only be accomplished through the action of the City Council. All that can be done by the Commissioner of Buildings himself is to communicate officially with the proper committee of the City Council in a report with such recommendation as may be deemed advisable. Nothing short of Council action will furnish legal warrant for any material change affecting the established and classified lines of service of the present Civil Service employees who have just been transferred to your jurisdiction.

May we suggest that the opportune time for submitting to the City Council for adoption any improved plan or system for inspecting the ventilation and plumbing of buildings that you have in mind to propose would be the time of the Council's consideration of the annual appropriation ordinance in January. Action thereon might be facilitated by submitting as soon as possible to the proper council committee such plans and recommendations as you have in mind for adoption by the Council.

(No. 6075—August 23, 1927—F. A. W.)

NEGLIGENCE, EMPLOYEES OF WATER DEPARTMENT, LIABILITY.

A city in distributing water to its inhabitants for profit is acting in its private as distinguished from its governmental capacity, and is liable for the negligence of employees in its water department.

Hon. John S. Clark, Chairman, Committee on Finance:

You recently submitted to us for an opinion the claim of Captain E. Korjan, U. S. Army, 6608 Stewart avenue, for damages sustained to his automobile caused by an employee of the Department of Public Works.

It appears that the damage to Captain Korjan's car was done by a City truck working out of the Bureau of Engineering and assigned to the Water Department. The liability of the City of Chicago is well settled in this kind of a case:

"The distribution of water to its inhabitants for profit by a City is a purely commercial transaction. It is well settled, therefore, that a municipality is liable for the negligence of its employees in connection with its Water Department, as it is acting in its private, as distinguished from its governmental capacity." *Wagner v. City of Rock Island*, 146 Ill. 154; *Chicago v. Selz Schwab & Co.*, 202 Ill. 545.

Our investigation indicates negligence on the part of the employee of the City of Chicago. We, therefore, recommend the payment of the claim of Captain Korjan in the amount of \$16.30.

(No. 6076—August 23, 1927—G. F. M.)

PENSIONS, CHIEF FIRE PREVENTION ENGINEER.

The office of Chief Fire Prevention Engineer being in the Fire service of the City since the Civil Service order of May 11, 1927, the incumbent of that office is a beneficiary of the Fire Pension Fund.

Board of Trustees, Firemen's Pension Fund:

Replying to your request for an opinion as to the right of Mr. John Plant, Chief Fire Prevention Engineer, to be enrolled as a beneficiary of the Firemen's Pension Fund, the following is submitted:

The minutes of the Civil Service Commission of the City of Chicago under date of May 11, 1927, contains the following order:

“Ordered that the position of Chief Fire Prevention Engineer heretofore classified in Branch II, Class D, Grade 5, be and the same is hereby reclassified in Branch 4, Class T, Grade 6, the duties of this position warranting this reclassification.”

This order classifies the position of Chief Fire Prevention Engineer in the fire service of the City.

Section 13 of the Firemen's Pension Act, among other things, provides as follows:

“In cities which have adopted an Act entitled, ‘An Act to regulate the civil service of cities,’ approved and in force March 20, 1895, all persons who have been or shall hereafter be appointed to any position which is classified by the Civil Service Commission of such city in the fire service of such city * * * shall be included within the meaning of the word or term ‘fireman’ or ‘firemen’ as used in this Act.”

The Firemen's Pension Act hereinabove referred to makes all firemen of the City of Chicago beneficiaries of the Firemen's Pension Fund.

I am of the opinion that Mr. John Plant became a beneficiary of the Firemen's Pension Fund and entitled to all of the benefits of that Fund on May 11, 1927, immediately upon the entry of the order in question by the Civil Service Commission of the City of Chicago.

If deductions from the salary of Mr. Plant have not been made and credited in the Firemen's Pension Fund since May 11, 1927, Mr. Plant should be requested to pay into the Firemen's Pension Fund such amount of money as may be found equivalent to the sum which should have been deducted from his salary since the date in question, and such sum should be placed to his credit in your Fund. Deductions from the salary of Mr. Plant for the purposes of the Firemen's Pension Fund should hereafter be made in accordance with the provisions of the Firemen's Pension Fund Act.

(No. 6077—August 29, 1927—G. F. M.)

PENSIONS, POLICE SURGEON.

The Police Surgeon under the present Statutes and Ordinances and the definition of policeman is not a beneficiary of the Police Pension Fund.

Hon. Michael Hughes, Superintendent of Police:

Replying to your request for an opinion as to the status of police surgeons with reference to the Police Pension Fund, the following is submitted:

The Policemen's Annuity and Benefit Fund Act, approved June 29, 1921, as amended, provides for the creation of a Policemen's Annuity and Benefit Fund for the benefit of policemen employed by such city and of the widows and children of such policemen and of all con-

tributors to, participants in and beneficiaries of any former Police Pension Fund in operation in the City of Chicago.

Section 12 of the Policemen's Annuity and Benefit Fund Act defines the word "policeman" as used in the Act as follows:

"Any person appointed and sworn or designated by law as a policeman of such city and who has served or is serving or shall serve in the regularly constituted Police Department of such city as a policeman, or policewoman, or police patrol driver, or police operator, or secretary of such police department, or police dog catcher, or police kennelman or police matron and member of the police force of such police department."

The Police Reorganization Ordinance (Ettelson's Chicago Municipal Code, 1922, page 847) as amended June 17, 1921 (Council Proceedings 1921-1922, page 447) designates police surgeons as members of the department of police, and includes them in the designation of "policemen," the designating section of the ordinance being as follows:

"The following members of the department of police, viz.: The superintendent of police, the deputy superintendent of police, the chief identification inspector, the *chief surgeon*, the assistant identification inspectors, the custodian of lost and stolen property, the secretary of the department, the secretary to the superintendent of police, the head clerk of the detective division, the drillmaster, the chief operator, the poundmaster, the two foremen of stables, and all captains, lieutenants, *police surgeons*, patrol sergeants, desk sergeants, detective sergeants, patrolmen, patrolwomen, police matrons, dog catchers, kennelmen, hostlers and operators, shall be known and *are hereby designated* as "policemen," and shall constitute the police force of the City of Chicago."

Rule 169 of the Rules and Regulations of the Department of Police, in force October 1, 1924, prescribes the duties of police surgeons as follows:

"Police Surgeons shall examine patients needing transportation in ambulances, and determine whether or not patients should be transported to hospitals. They shall examine and give first-aid treatment to injured persons. They shall also on request of the commanding officer of the station to which they are detailed, examine and give first aid treatment to sick or injured persons in the care or custody of the police. Police Surgeons shall direct the disposition of all cases handled by ambulances or referred to them for examination. They shall be in charge of ambulances, and shall be responsible for the condition of same, and its equipment. They shall submit to the Chief Surgeon such reports and requisitions for medical supplies as may be required from time to time. Police Surgeons shall provide themselves with a box or bag containing such instruments as may be required, which shall at all times be carried when answering calls. They shall keep a record of all medical supplies received and used."

While the ordinance designates police surgeons, as "policemen" the statute requires that the "policeman" entitled to the benefits of the Policemen's Annuity and Benefit Fund Act shall be a person who not only has been appointed and sworn or designated by law as a policeman, but one who has served or shall serve in the regularly constituted Police Department of such City in one of the capacities mentioned in the definition of the word "policeman" hereinabove quoted from section 12 of the Act. The duties of a police surgeon as set out in Rule 169 above quoted, do not apparently bring police surgeons within the statutory definition of "policeman."

I am of the opinion that the police surgeons are not entitled to the benefits of the Policemen's Annuity and Benefit Fund.

(No. 6078—August 29, 1927—M. J. M.)

1 PUBLIC GARAGE, LOCATION.

A public nursery or licensed home for babies such as the Augustana Nursery is a hospital within the meaning of section 246 of the Municipal Code of Chicago for the purpose of preventing the building and operating of a public garage within 100 feet of such nursery.

2 MUNICIPAL CODE.

Section 246 includes a public nursery or licensed home for babies within the term of "hospital."

Hon. Herman N. Bundesen, Commissioner of Health:

Your communication containing an inquiry, "Whether or not the Augustana Nursery, a licensed home for babies, can offer any objection to the erection of a public garage on North Clark street, directly east, which may have an entrance on Lane Court," also "Can the Augustana Nursery prevent the erection and operation of a public garage within 100 feet of the home?" has been referred to me.

In reply, I wish to say that section 246 of the Chicago Municipal Code, reads thus:

"No person, firm or corporation shall locate, build, construct or maintain any public garage within two hundred feet of any building used as and for a hospital, church or public or parochial school or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any public garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street; provided, that all lots which abut only on a public alley or court shall be considered as fronting on the street to which such alley or court leads. Such written consents shall be obtained and filed with the commissioner of buildings before a permit is issued

for the construction of any such building, or before a license is issued for the operation of any public garage in any existing building; provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes, any building fronting on another street and located upon a corner lot shall not be considered; and, provided, further that the word 'block,' as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets."

"Hospital" is defined in Webster's New International Dictionary as a charitable institution for the refuge, maintenance or education of needy, aged, infirm or young persons; an institution or place in which sick or injured are given medical or surgical care, commonly in whole or in part at public expense or by charity.

These definitions bring "A licensed home for babies," within the meaning of hospital, and therefore, I am of the opinion that a licensed home for babies being a hospital within the meaning of this definition, they may legally offer objection to the erection or operation of a public garage within 100 feet of the home in question.

(No. 6079—August 30, 1927—F. J. V.)

1 AMATEUR BOXING BOUTS, POLICE.

Neither the State Athletic Commission nor the American Athletic Union but the Athletic Commission of Chicago with the aid of the police has power to control and regulate amateur boxing matches in the City of Chicago.

2 AMERICAN ATHLETIC UNION, POWER, AMATEUR BOXING.

This organization has power only over its own members, is no part of the State or City government and has no law enforcing character whatever, so that it has no authority to prevent amateur boxing matches.

3 STATE ATHLETIC COMMISSION, JURISDICTION, POLICE.

Amateur boxing matches or exhibits are not within the jurisdiction of the State Athletic Commission and therefore cannot be prevented by that Commission alone or through the offices of the police.

Hon. Michael Hughes, Superintendent of Police:

You submit to the Law Department for an opinion, the communication of Mr. Walter Meaker, 159 N. State St., "in which he requests an opinion as to the right of this (Police) Department, under the law, to prevent amateur boxing bouts at the request of the Illinois State Boxing Commission and the A. A. U. of Chicago."

Mr. Meaker complains that the Police Department, at the request of the American Athletic Union, stopped an amateur boxing exhibition which he conducted without consulting this organization. This, we are informed, is a private organization which "is collecting a sum of ten dollars for each permit, and compelling each chartered club to put up one hundred dollars cash bond." Mr. Meaker's "protest (is) against the Police Department being used to stop amateur boxing at the request of the Illinois State Boxing Commission and the A. A. U. of Chicago."

Reference is made to an opinion of Attorney General Oscar E. Carlstrom, under date of October 13, 1926, writ-

ten at the request of the Secretary of the State Athletic Commission. The request was for a construction of the Act of July 13, 1925, on the jurisdiction of the State Athletic Commission over amateur boxing and particularly for the construction of section 22 of the Act, which reads as follows:

“No amateur boxing, sparring or wrestling match or exhibition, which is hereby defined to be one in which the participants receive no compensation, gifts, emolument, or percentage of the gate receipts, either directly or indirectly, shall be subject to the provisions of this Act, except that they are permitted.”

The Attorney General, referring first to section 8 of the Act, says:

“This section gives the State Athletic Commission control where boxing, sparring and wrestling matches or exhibitions for prizes or purses are held or where an admission fee is charged or received, but section 22 defines what an amateur boxing, sparring or wrestling match or exhibition is, and then provides that such amateur matches or exhibitions are not subject to the provisions of this act, except that they are permitted to be held. While the language of these two sections seems to be somewhat confusing and ambiguous, yet I am of the opinion that it was the intention of the General Assembly under the language of section 22 to exempt all amateur performances of this kind, so far as the authority of the Commission is concerned, and that the Athletic Commission has no jurisdiction or authority whatever over amateur performances, even though they are held in connection with dinners, stags, vaudeville shows, etc., and where a charge is made either for admission or as a cover cost of the dinner.”

That the State Athletic Commission has no jurisdiction or authority over amateur boxing matches or exhibitions is so obvious from the express exemption of the quoted section 22 as to admit of no question. But the opinion of

the Attorney General, as the highest legal authority of the State, is conclusive, unless and until it should be overruled by the State courts of appellate jurisdiction. Since the State Athletic Association has no jurisdiction or authority over amateur boxing it cannot confer any jurisdiction on the Police Department, nor is the Department warranted in a legal way to do the bidding of the Association in any matter pertaining to such boxing.

The private organization known as the American Athletic Union, of course, has no power or authority whatever over amateur boxing matches or exhibitions, except to require its own members to observe its own rules. This organization is in no way recognized as an arm of the State or City governments and has no law-enforcing character about it. It may not interfere in the conduct of amateur boxing, and the Police Department is utterly without any legal warrant to do the bidding of such a private organization.

In so far, therefore, as the Police Department acted upon the authority of the State Athletic Commission or the American Athletic Union or both in stopping or attempting to control amateur boxing bouts in the City of Chicago, it was acting without any authority or sanction of law.

Amateur boxing matches and exhibitions are subject only to the police power of the City of Chicago, and are governed exclusively by the provisions of the Cities and Villages Act and the ordinances adopted pursuant thereto. Clause "fifty-eight" of section 1, art. V, of that Act empowers the City Council, "to regulate places of amusement," and by the "Forty-first" clause of said section 1 the Council is empowered "to license, tax, regulate and prohibit * * * exhibitions, shows and amusements," etc. Smith-Hurd's Stat., 1925, p. 222, Ch. 24.

That the place where an amateur boxing match or exhibition is held comes within the designation "places of amusement" is decided we think, by the case of *City of Chicago v. Green Mill Gardens*, 305 Ill. 67.

Amateur boxing matches and exhibitions are governed by the provisions of the Ordinance on General Amusements. Chicago Municipal Code, 1922, Ch. VIII, pp. 42-57.

Article I of the Ordinance classifies amusements and provides for the licensing thereof. Article II creates the Athletic Commission of the City of Chicago, defines the Commission's powers and duties, exacts a license for athletic exhibitions and prescribes the fee to be paid therefor.

Only the Athletic Commission of the City of Chicago has jurisdiction, power of control and regulation over amateur boxing bouts and exhibitions in Chicago, and to such Commission alone should the Police Department give heed in the matter of any interference with amateur boxing in the City. Not only is "amateur boxing" lawful in itself, but the Legislature, by the Act above quoted, expressly exempts such boxing exhibition from its provisions and declares "*that they are permitted.*" And section 199 of the Amusement Ordinance (Chicago Municipal Code, 1922, p. 54) directs the Athletic Commission of Chicago to adopt rules defining amateur and scholastic athletic contests, and to provide for exemption of exhibitions of the same from such provisions of this chapter as the commission deems necessary *to prevent any undue interference with exhibitions of such contests*. All that is required to make amateur boxing permissible in the City of Chicago, is a substantial compliance with the provisions of section 199 of the Ordinance, *supra*, and the exclusive supervision of such exhibitions by the Athletic Commission of the City of Chicago.

(No. 6080—August 31, 1927—J. G. D.)

1 ORDINANCES, SUSPENSION OR REPEAL.

An order of the City Council cannot amend, modify, suspend or repeal an ordinance.

2 FILLING STATION, PERMIT, WITHDRAWAL.

A permit for a filling station to be erected and operated within 200 feet of a training school cannot be based upon an order of the City Council in violation of ordinance; and if so based, the permit should be withdrawn.

Hon. Albert W. Goodrich, Fire Commissioner:

Mr. Peter Wall of the Industrial Work Shops School, a Jewish Training School, doing rehabilitation work with 150 students who are mentally and physically defective, located at 554 West 12th place, Chicago, within sixteen feet of the proposed Gasoline Filling Station, at 549-551 West Roosevelt Road, for which I am advised you have issued permit No. 15391, was in my office protesting against the issuing of this permit.

Section 2279 of the Municipal Code, 1922 (Ettelson), provides among other things:

“No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.”

In the case of *People ex rel. v. William Hale Thompson, Mayor*, 209 Ill. App. 570, the following doctrine is announced:

“An ordinance declaring it unlawful for any person to locate, build or maintain a garage within 200 feet of any building or the grounds thereof used for a hospital or public school cannot be repealed, amended or suspended by an order of the City Council directing the commissioner of buildings to issue a permit in

contravention thereof and one on whose behalf such an order is issued receives no legal right by such order."

At that time you will note the ordinance provided that the school must be a public school, but the present ordinance above referred to applies to any school.

If I am correctly advised of the facts, this permit was improperly issued and should be withdrawn.

In the City Council Proceedings of August 24, 1927, page 1043, the following appears:

"Ordered, That the Fire Commissioner be and he is hereby ordered, authorized and directed to issue a permit to Maurice Alschuler to install tanks for gasoline filling station at Nos. 549-551 West Roosevelt Road; provided that the necessary frontage consents are on file in the Bureau of Fire Prevention."

I do not think this Council Order abrogates the City Ordinance.

"Our Supreme Court has repeatedly held that an ordinance of the city cannot be amended, modified, suspended, or repealed by an order, and that, where the terms and provisions of an ordinance and an order are in conflict, the order must give way to the ordinance. (173 Ill. 91; 174 Ill. 439; 203 Ill. 23; 214 Ill. 102; 207 Ill. App. 570.)" Opinions of Corporation Counsel 1925-1926, page 41.

(No. 6081—September 2, 1927—L. H.)

1 CONTRACTS, UNSIGNED BID ACCEPTABLE.

An unsigned proposition or bid accompanied by certified check and enclosed in an envelope bearing the name of the bidder whose bid is the lowest may be accepted as a valid bid.

2 CONTRACTS, BIDS, WITHDRAWAL.

A bidder cannot withdraw a bid regularly submitted by him.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter under date of August 26, 1927, states that you received proposals for certain standard special castings for water pipe; that the lowest bidder submitted an unsigned proposal; that such proposal was contained in an envelope bearing the bidder's name, and was accompanied by check properly certified; that the proposals were submitted after due and legal advertisement.

You ask whether it would be legal to award the contract to this bidder on the unsigned proposal.

At our request, you submitted to us the form of advertisement and proposal on which the bids were submitted. We assume that the bidder complied in all respects to the requirements except in the particular mentioned, and that he was otherwise qualified.

It may be said at the outset that if either the statute or the ordinances which control the letting of contracts by the municipality required signed bids, by express words, there would be no avoiding of such a provision. This would be true even though the failure to sign the bid was obviously an oversight as in this case. But since the provisions of the law relate to signed written contracts merely, the question presented is whether the requirement to sign bids which appears in the specifications is only

directory or is such a substantial requirement as must be complied with in order to render the bid valid.

The law applicable to the case is thus stated by a leading text-writer:

“An important question is whether the municipality is in duty bound to reject a bid not in compliance with the proposal or whether it may, in its discretion, overlook the insufficiency and notwithstanding its existence award the contract to one who is the lowest bidder but has not strictly complied with the request for bids. In some cases it has been held that the municipality may accept such a bid. The rule supported by reason would seem to be that if the omission or irregularity is merely technical it may be overlooked, but that if it is a substantial requirement affecting the amount of the bid or the like the municipality must reject such bid notwithstanding it is the lowest bid.” McQuillin, *Mun. Corp.*, sec. 1232.

A case in point is *Prendergast v. City of St. Louis*, 258 Mo. 648. The contractor in that case failed to sign the bid as required by the ordinance, although the name of the corporation appeared. The court held that the bid was legal, but says among other things:

“It is not necessary to go to the extent of saying that a lawful contract following a wholly unsigned bid would withstand the objection now made. This record shows that the name of the company was actually signed to the bid and this was done under the immediate direction of the company’s president, whose authority to sign the corporate name is not questioned. The fact that the president did not add his name as that of the person affixing the corporate signature, he having in fact caused it to be affixed, cannot be relied on to invalidate the company’s lawfully executed contract, subsequently made, based on the bid thus signed.”

While the excerpt above quoted might at first blush be regarded as inferentially against the bidder in the instant

case, upon further reflection it seems to lean very much towards him. That is to say, when it is considered that the signature in the Missouri case was in contravention of express law, and that the court does not say it would have held the contract unlawful if the bid had not been signed, it becomes evident that there is at least strong reason for regarding the provision in question here as merely directory.

The real test seems to be whether or not the City would be justified in forfeiting the deposit if the contractor were to refuse to enter into a contract at this time, or whether such forfeiture could be enforced if the City were compelled to accept the next lower bidder. A bidder cannot withdraw a bid after he has submitted it. Consequently, even if he claims to have made a mistake, or even knows that he has actually made a mistake, he cannot withdraw his bid. The same author above quoted says:

“A bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it.” McQuillin, *Mun. Corp.*, sec. 1222.

In *Baltimore v. Robinson*, 123 Md. 660, it was held that the bid cannot be withdrawn or altered after filing, and that the forfeiture can be enforced. In that case, however, the statute provided that bids, when filed, are irrevocable. In our own state, where we have no such statute, it has been that that a party must be held to accountability where he deposits a sum of money with the understanding that it will be forfeited if he neglects or refuses to do the work. *Village of Morgan Park v. Gahan*, 136 Ill. 515; *Robinson v. Board of Education*, 98 Ill. App. 100.

There appears to be a tendency on the part of the courts in this and other jurisdictions to treat the submission of the bid as the act on which the rights of the par-

ties depend, and to make no allowance for mistakes even when they are discovered before the opening of the bids. *Kimball v. Hewitt*, 2 N. Y. Supp. 697; aff'm'd in 15 Daley 124; *Wheaton B. & L. Co. v. Boston*, 204 Mass. 218; *Twiss v. Port Huron*, 63 Mich. 528.

This strictness is undoubtedly due to the fact that a relaxation of the rule would open the door to collusion and fraud, and the attitude of the courts comports with reason and justice. If a party were to be permitted to withdraw his bid, or to claim that it is void on account of a mistake, or to take the position that he is not bound because he has not signed it, there would be no chance of enforcing the forfeiture of the deposit in the case of a bidder inclined to be dishonest.

We are therefore of the opinion that, inasmuch as the bidder in this case has submitted his proposal and deposit in apparent good faith, he is entitled to the benefit of the rule that there should be an award to the lowest bidder, just as he would be bound to make the contract or forfeit his deposit if the City undertook to compel him to do so.

There is, of course, no obligation on your part to accept the bid if you prefer to reject all bids under the power reserved by you. Nor is there anything to prevent you from overcoming the slight doubt that remains through the instrumentality of a Council order passed by a two-thirds vote directing the letting of this contract to the bidder in question.

(No. 6082—September 2, 1927—F. J. V.)

1 PRIZES AND GIFTS, DISTRIBUTION, THEATRES.

A theatre license contains a provision against the distribution of gifts or prizes to patrons to induce or increase attendance and it is unlawful for the owner or proprietor of a theatre to make it a practice to distribute gifts or prizes either for himself or to permit it for the benefit of another.

2 THEATRE LICENSE, REVOCATION.

The action of the Mayor in revoking a license to operate a theatre is not reviewable by the courts where the license contains a provision that it may be revoked in the discretion of the Mayor and the licensee has assented to the provision by accepting the license.

3 LICENSE, MOVING PICTURE THEATRE.

The City Council has full power to license, regulate and control moving picture houses whether they are regarded as theatrical exhibitions or as a place of amusement.

4 WORDS AND PHRASES.

"Amusement" is synonymous with diversion, entertainment, recreation, pastime and sport.

Hon. Michael Hughes, Superintendent of Police:

Complying with your request we are submitting our "opinion as to whether or not the practice by certain moving picture theatres of distributing gifts to their patrons is a violation of the law or of the terms stated on the face of the license issued for such a place."

By clause 4 of section 1 of article V of the Cities and Villages Act, the City Counsel is expressly empowered "to fix the amount, terms and manner of issuing and revoking licenses." The forty-first clause of said section 1 empowers the Council "to license, tax, regulate, suppress * * * theatricals and other exhibitions, shows and amusements, and to revoke such licenses at pleasure." And the fifty-eighth clause of that section grants power "to regulate places of amusement." Smith-Hurd's Stat., 1922, ch. 24, pp. 222-3-4.

Pursuant to these specific grants of power and other general grants contained in the Cities and Villages Act, the City Council passed the ordinance governing "general amusements." This ordinance classifies such amusements, exacts a license, prescribes special requirements, conditions, fees and penalty. Chicago Municipal Code, Ch. VIII, pp. 42-57.

Section 176 of that Ordinance places "moving picture theaters" in the "1st class" of "general amusements," and in the last or 22nd class of amusements are placed "all entertainments, exhibitions, performances, or amusements, not included in any of the foregoing clauses." We think the exercise of power under the ordinance to license, regulate and control moving pictures is fully sustained by the specific grants of power above enumerated. If it were questionable whether the moving picture constituted a "theatrical," "exhibition" or "show," it certainly is an amusement. The Supreme Court has said:

"Cities and villages are granted specific power by the aforesaid provisions to license, tax and regulate amusements and places of amusement. Webster says that the word 'amusement' is synonymous with diversion, entertainment, recreation, pastime and sport." *Chicago v. Green Mill Gardens*, 305 Ill. 87, 93.

Since the City Council has the general power to license and regulate moving picture houses and exhibitions, the particular question arises, is it lawful regulation to prohibit the distribution of gifts and prizes in connection with the management and operation of such motion picture theaters?

Section 186 of the Municipal Code, being a section of the general amusement ordinance referred to, provides as follows:

"All licenses for entertainments of any of the foregoing classes shall contain a proviso that no gaming,

raffle, lottery, or chance distribution of money, gift or article of value, shall be connected therewith or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors. * * *

If this is a valid ordinance provision, then distribution of gifts and prizes in moving picture theaters is absolutely and unconditionally prohibited, and is, therefore, unlawful. It appears from the statements of the theater owners and police investigators that the practice of distributing gifts and prizes is in fact an advertising method of the neighborhood merchants who advertise on the screen and as a consideration therefor donate the gifts and prizes which are distributed to the patrons of the theater. This cannot lawfully be done in the face of the foregoing explicit ordinance provision that such distribution of gifts or prizes "*shall not be connected therewith (theatre) or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors.*"

It is our opinion that the facts stated constitute a violation of the Ordinance and a breach of the license issued thereunder. *Chicago v. Green Mill Gardens*, 305 Ill. 87; *Metropolis Theater Co. v. City of Chicago*, 228 U. S. 61.

The forty-first clause of section 1, article V, *supra*, empowers the City Council to license and regulate theatricals and other exhibitions, shows and amusements, "*and to revoke such licenses at pleasure.*" The exercise of such a power of revocation has been held to be absolute and not reviewable by the courts. *Launder v. Chicago*, 111 Ill. 291; *Schwuchow v. City of Chicago*, 68 Ill. 449; *Grand Rapids v. Brandy* (Mich.), 32 L. R. A. 116.

However, the Council, acting under the express grant of power to fix the terms and manner of issuing and revoking licenses, has prescribed certain conditions and requirements

to be observed, and by said section 186, *supra*, has expressly declared that "all licenses (for moving picture theaters) shall contain a proviso" that no distribution of gifts or prizes shall be connected with, permitted or allowed by the person obtaining such license. Section 184 of the Ordinance provides that every license shall be subject to all existing and subsequently adopted ordinances, and section 192 provides revocation of license and a fine as penalties for violation of the ordinance or license provisions.

Where a party applies for and accepts a license under an ordinance imposing conditions and restrictions, and the license itself contains a condition that it may be revoked at the discretion of the Mayor, he thereby assents to the terms and conditions imposed, both in the license and the ordinance under which it is issued. *Schwuchow v. City of Chicago*, 68 Ill. 444.

We are therefore of the opinion that the practice of distributing gifts or prizes to the patrons of moving picture theaters is unlawful and may be prohibited, whether such distribution is made by the proprietor of the theater for himself or is permitted and allowed by him for the benefit of another.

(No. 6083—September 2, 1927—F. J. V.)

1 FIREARMS, SALE, DELIVERY, PERMIT.

A permit from the superintendent (now commissioner) of police is not necessary where the purchase of firearms by a municipality outside of the City of Chicago is for outside delivery; but such a permit is necessary where the delivery is within the City, regardless of who makes the purchase, whether resident or nonresident.

2 FIREARMS, PERMIT, ISSUANCE.

Except to minors and persons convicted of crime, it is the duty of the superintendent (commissioner) of police, upon payment of \$2.00 and proof that the applicant is of good moral character to issue permit to a licensed dealer in firearms, whether he be a resident or nonresident.

3 FIREARMS, DEALER'S DUTY.

The seller of firearms is required to exercise the same precaution and prudence that governs the ordinary man in affairs of life so as to assure his own protection and at the same time a full compliance with the law.

Hon. Michael Hughes, Superintendent of Police:

We have your recent communication with enclosure of letters of inquiry directed to you pertaining to the sale and delivery of fire arms within the City.

The first question submitted is whether or not it is permissible to make deliveries to suburban officers of "those revolvers which they purchase on requisition or written order from their municipalities."

The second inquiry is by a firm which desires to know how they are to protect themselves in the sale of fire arms to a person or firm which claims to have a license to buy and sell revolvers.

Both these questions depend, for answer, upon the construction to be placed upon sections 1259 and 1260 of article IV of the Ordinance on fire arms and weapons, which sections read as follows:

"It shall be unlawful for any person, firm or corporation to sell, barter or give away to any person within the city of Chicago, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person, except to licensed dealers and to persons who have secured a permit for the purchase of such articles from the superintendent of police as hereinafter required; provided, this section shall not apply to sales made of such articles which are to be delivered or furnished outside the city of Chicago.

"It shall be unlawful for any person to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without first securing from the superintendent of police a permit so to do. Before any such permit is granted, an application in writing shall be made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality, and other elements of identification, of the person desiring such permit, and the applicant shall present such evidence of good character as the superintendent of police in his discretion may require.

"It shall be the duty of the superintendent of police to refuse such permit to (a) all persons having been convicted of any crime; (b) all minors.

"Otherwise, in case he shall be satisfied that the applicant is of good moral character, it shall be the duty of the superintendent of police to grant such permit, upon the payment of a fee of two dollars." Chicago Municipal Code, 1922, pages 359, 366, 377.

By section 1259, three classes of purchasers are enumerated, viz: (1) "Licensed Dealers;" (2) "Persons who have secured a permit for the purchase of such articles from the Superintendent of Police;" (3) Purchasers to whom such articles "are to be delivered or furnished outside the city of Chicago." This section specifically provides that it should not apply to purchasers and sales of the Third Class. Your first inquiry pertains to this class of purchasers, and the particular question is whether or not, in

the case of sales of fire arms "which are to be delivered or furnished outside the city of Chicago" such fire arms may be delivered to such persons personally within the city of Chicago. Since only such sales are exempted from this section in which delivery is to be made outside the city of Chicago, the delivery cannot be made within the City, except upon a permit from the Superintendent of Police as by the section required. In other words, if the fire arms "are to be delivered or furnished outside the city of Chicago" the sale is not governed by this section, but if the thing sold is to be delivered within the city of Chicago, then it is governed by the section and no such delivery may be made except upon the permit and it can make no difference in the case that the purchaser happens to be a suburban sheriff or police official.

It is suggested, by the firm making this inquiry, that they are unable to obtain permits for delivery from your department because they are not residents of Chicago. There is nothing in the Ordinance which prohibits licensed dealers from making sales of fire arms and weapons to non-residents, nor is there anything which limits the power of the Superintendent of Police to issue permits for purchases to resident citizens of Chicago only. In fact said section 1260 specifically provides that "it shall be the duty of the Superintendent of Police to refuse such permit to (a) all persons having been convicted of any crime; (b) all minors.

Otherwise, in case he shall be satisfied that the applicant is of good moral character, it shall be the duty of the Superintendent of Police to grant such permit, upon the payment of a fee of two dollars."

Since the Ordinance specifically names those to whom the superintendent shall refuse such permit, and non-residents are not included therein, by the rule of exclusion such non-

residents by compliance with the Ordinance, are as much entitled to such permit from the superintendent as are residents of the City.

The second inquiry merely involves the precaution which a seller is to take in sales of fire arms made to purchasers who represent themselves at the time of purchase as having a license to buy and sell. We do not believe that it would be proper or prudent for the department of police or its superintendent to suggest just what precaution the seller is required to take under the provisions of the Ordinance relating to sale and delivery of fire arms or weapons, nor is it possible even for the law department to advise in such case, except in a general way. Such sales are prohibited except to licensed dealers and to persons who have a permit and where delivery is to be made outside the city of Chicago. In each such case it becomes a question of fact for the seller to determine for himself. In the particular case inquired about here, we might suggest that it would be an easy matter to communicate with the License Bureau of the City and determine whether the representation made by the purchaser for the license is true. In such cases as this the seller should exercise the same precaution and prudence that should govern the ordinary man in the affairs of life, so as to assure his own protection and at the same time a full compliance with the law. Since there is no question of law submitted to us upon this second inquiry, we respectfully content ourselves with the general suggestion here made.

(No. 6084—September 6, 1927—L. H.)

1 WRECKING BUILDING, PERMIT.

An ordinance requirement to file bond, to erect scaffolding and do other acts promotive of public safety as a prerequisite to securing a permit to wreck a house or building is within the police power of the City and enforceable.

2 MUNICIPAL CODE.

Section 443 prescribing certain conditions as prerequisites to obtaining permit to wreck buildings is valid.

*Mr. Daniel S. Wentworth, 56 West Randolph Street,
Chicago, Illinois:*

In your letter of recent date you complain because a client of yours has been refused a permit to wreck a building owing to her failure to comply with the provisions of section 443 of the Chicago Municipal Code of 1922. You call attention to an opinion of the Attorney General of the State of Illinois, in which he holds that a person does not violate the plumbing statute when he employs an unlicensed plumber to work on his house. You say that the basic principle is the same in the case of a person desiring to wreck a house and that the Building Department has not the right to refuse a permit.

You understand, of course, that this department would not pronounce an ordinance of the City Council invalid unless it was plain beyond any doubt that it could not stand. Therefore, even if the case were analogous with the one you refer to, we would hesitate to say that the ordinance should not be enforced. We fail to see, however, where there is any similarity in the two enactments or in the situation of the parties.

The statute relating to plumbers requires persons who follow the business of plumbing to be registered, and provides penalties in case such persons fail to procure certifi-

cates. It does not prescribe the duties of owners of houses in their relation to plumbers. The Attorney General, in his opinion, says that "the law might have made it unlawful to employ an unlicensed person," but it didn't. Hence, there being no penalty imposed for doing so, an owner of a house may employ an unlicensed plumber—always provided, however, that there is no local ordinance which prohibits it.

In the case of section 443 of the Code there is no requirement for licensing, but all parties who desire to wreck houses are required to file bonds, erect scaffolding, and comply with the other provisions designed to promote the public safety. If a party owning a house desires to employ a person who does not regularly make a business of wrecking houses, he may do so in case the party he employs meets these requirements. Hence, there is nothing in this section which is controlled by the principle stated in the Attorney General's opinion.

In our opinion, the provisions prescribed in section 443 of the Chicago Code of 1922, as conditions before permits for wrecking houses are issued, are salutary and tend towards greater safety for the public. Hence, they are within the City's police powers, and will undoubtedly stand the test of validity.

(No. 6085—September 6, 1927—G. F. M.)

1 PENSIONS, POLICEMEN'S ANNUITY, BASIS FOR CALCULATION.

Calculations for annuity purposes prior to July 7, 1927, in case of policemen were to be made on the old basis of \$2,600.00 annual salary, since the law providing for an increase in the maximum salary basis to \$3,000.00 did not become effective until July 7, 1927.

2 STATUTES, RETROACTIVE EFFECT.

In the absence of a retroactive provision, a statute operates only from and after its passage and approval by the Governor.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion relative to the recent legislation increasing the maximum salary base for annuity purposes from \$2,600 to \$3,000 per annum, the following is submitted: Your letter asks—

(a) Whether the prior service credits of policemen within the scope of this provision whose respective salaries on January 1, 1922, exceeded \$2,600 per annum should be recalculated; and

(b) Whether adjustment of salary deductions and City contributions for annuity purposes is necessary in the case of active policemen whose respective salaries were at any time during the period January 1, 1922, to June 30, 1927, in excess of \$2,600 per annum.

Both of these questions can be answered by the statement that one of the rules of statutory construction is that a statute operates only from and after its passage and signature by the Governor in the absence of a retroactive provision. The increase of the maximum salary base for annuity purposes from \$2,600 to \$3,000 per annum became a law on July 7, 1927, at which time the bill amending the present Policemen's Annuity and Benefit Fund Act was

signed by the Governor. This amendatory maximum salary base becomes effective from and after July 7, 1927, and as the amendment was not made retroactive, the change in salary base does not affect calculations on the old basis of \$2,600 made prior to July 7, 1927.

(No. 6086—September 6, 1927—L. H.)

CLAIMS, PAYMENT, ANNEXED VILLAGE.

Claims against a village which has been annexed to the City of Chicago, although acknowledged by the former village clerk as a proper liability cannot be paid without the authority from the City Council.

Hon. Charles C. Fitzmorris, City Comptroller:

You have asked us for advice in relation to the small claims against the Village of Mount Greenwood which are being filed with you. It appears, from your letter, that there are a great many for small sums; that they are acknowledged by the former clerk of the Village as proper liabilities, and that they seem to bear evidence of appropriations having been duly made therefor.

The question you ask is whether you would not be justified in paying these claims out of monies on hand turned over by the Village and now held temporarily as a special deposit pending final disposition. You say that this would be doing just what you did with the interest coupons on bonds that were due on July 1, and that you would simply be paying what the Village would have paid before remitting the money to you if time had permitted.

These claims do not stand on the same footing as coupons on bonds. This department has held that the passing of an ordinance authorizing a bond issue and its subse-

quent affirmance by the voters, amounts to an appropriation; that is not the case in regard to claims of the kind you mention.

The difficulty in the present instance is that the Village of Mount Greenwood did not pass an appropriation ordinance for the current year. If it had, we would advise you to pay the claims and charge them up to the sums held in the special deposit of which you speak. Unquestionably, under the law there must be an appropriation to draw on before you can pay such claims. We do not like to raise an objection that will be regarded as insuperable where the amounts involved are small, as you say, but we are constrained to advise you that in case you pay the claims in question without some authority from the City Council, you would be personally liable in case the City Council failed later on, to make due appropriation for the purpose.

We suggest, as a way out of the difficulty, that you submit to the City Council a list of the small claims, and ask for authority to pay same out of the fund that you are holding as a special deposit, pending an appropriation for them when the next annual appropriation ordinance is passed. While this would be decidedly irregular, and cannot be said to be legal, we have no doubt it would relieve a great deal of inconvenience to parties who are suffering on account of the holding up of small undisputed claims, and the risk attendant thereon would be trifling.

(No. 6087—September 7, 1927—J. W. B.)

ALDERMEN, ELECTION CONTEST, CITY CLERK'S DUTY.

An order of the City Council which declares a person elected alderman, annuls a certificate of election issued to another and requires the City Clerk to administer the oath of office to the person so declared elected, entitles such person to be recognized by the City Clerk as alderman and to have his name placed upon the payroll.

Hon. Patrick Sheridan Smith, City Clerk:

We are in receipt of your communication of September 6, 1927, advising us that at a regular meeting of the City Council, held August 31, 1927, the following order was passed:

“ORDERED, That Titus A. Haffa be and he hereby is declared to be the duly elected alderman of the City of Chicago from the Forty-third Ward, and that the certificate of election heretofore issued to one Arthur F. Albert be and the same is hereby declared to be null and void, and of no effect, and the City Clerk is hereby directed to administer the oath of office of Alderman of the Forty-third Ward to said Titus A. Haffa.”

You request us to advise you as to whether said action of the City Council makes it incumbent upon you and gives you full authority to place the name of said Titus A. Haffa on the pay roll of the City as Alderman from the Forty-third Ward and in all other respects to recognize the said Titus A. Haffa as Alderman from the Forty-third Ward in place of the said Arthur F. Albert.

In reply, we beg leave to advise you that section 6 of article III of the Cities, Villages and Towns Act provides that “the City Council shall be the judge of the election and qualification of its own members.”

In view of this provision of the statute and the action of the City Council in deciding the contest over the elec-

tion of Alderman from the Forty-third Ward in favor of Titus A. Haffa, it becomes your duty as City Clerk to place the name of said Titus A. Haffa on the pay roll of the City as Alderman from the Forty-third Ward, and it is also your duty to accept the decision of the City Council as binding upon you in every respect, and to recognize the said Titus A. Haffa as Alderman of the Forty-third Ward in place of the said Arthur F. Albert.

(No. 6038—September 9, 1927—J. N. K.)

1 PLUMBER'S LICENSE, REVOCATION.

Plumbers' licenses are revokable, since the Plumbers' License Act of 1917, only by the Department of Registration and Education upon proper proceedings being brought before it.

2 MUNICIPAL CODE.

Section 2944 of the Municipal Code of 1922 which is a re-enactment of section 1781 of the Code of 1911 has been superseded by section 8 of the Plumbers' License Act of 1917.

Mr. J. Floyd Walsh, Board of Examiners of Plumbers:

Your letter of September 7, 1927, to this department requesting an opinion regarding the procedure necessary to revoke a Master Plumber's license has been received. You call our attention to section 2944 of the Municipal Code and to section 7 of the statute providing for the licensing of plumbers.

In reply we desire to say that section 2944 of the Municipal Code of 1922 is a re-enactment of section 1781 of the Code of 1911. These two sections are identical in their terms and were apparently enacted by the City Council under the provision of an act of the Legislature passed at

the session of 1897. This act was in force in 1911 when section 1781 of the Code of 1911 was passed. Section 7 of the act of 1897 reads as follows:

“Any person violating any provisions of this act shall be deemed guilty of a misdemeanor and be subject to a fine of not less than five dollars (\$5.00) nor exceeding fifty dollars (\$50.00) for each and every violation therefor, and his certificate may be revoked by the board of health or proper authorities of said city, town or village.” Laws of 1897, page 280.

So that it will be seen that under the terms of this section of the act the City Council under the power given it had the right to designate the city officer who would have power to revoke a license granted to a plumber under the act of 1897 and that in pursuance of such power the Council fixed the authority in the Mayor to make such revocation.

The act of 1897 was declared valid in the case of *Douglas v. People*, 225 Ill. 536, but in 1917 the act of 1897 was amended and the provision with reference to penalties and revocation of license was changed. In section 8 of the act of 1917 it is provided that:

“Any person violating any provision of this Act shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars (\$5.00) for each and every violation therefor and whenever such person has a plumber certificate the same may be revoked by the Department of Registration and Education: Provided, that no certificate shall be revoked before the holder thereof has been given reasonable notice of the charge against him and an opportunity for a full hearing before the Department of Registration and Education. For the purpose of conducting such hearings the Director of Registration and Education shall appoint three competent, reputable and licensed plumbers. The action or report in writing of a majority of the persons designated, shall be sufficient authority upon

which the Director of Registration and Education may act." Cahill's Statutes, 1927, chapter 109a, page 1940.

From our examination of the statutes and the ordinances we are of the opinion that since the passage of the act of the Legislature in 1917 the provisions of section 1781 of the Municipal Code of 1911 and of section 2944 of the Code of 1922 are inoperative and have been repealed and superseded by the provisions of section 8 of the Act of 1917. Said section provides that the Department of Registration and Education may revoke the certificate of a plumber under the conditions fixed by the statute and upon hearing provided for in the statute.

The application for revocation of plumber's license or certificate should be made to the Department of Registration and Education as the power to revoke is vested in that Department only and in no other officer or tribunal.

(No. 6089—September 14, 1927—L. H.)

CLAIMS, IRREGULAR CONTRACT, LIABILITY.

The City is liable for work done at the request of someone in authority acting in behalf of the City where the contract although irregularly entered has been fully performed on the part of the claimant, the work has been accepted by the City, the amount claimed is reasonable, and all of the parties have acted in good faith.

Hon. Edward J. Glackin, Secretary, Board of Local Improvements:

Under date of March 25, 1927, this department advised the Acting President of the Board of Local Improvements that a certain bill of Powell Bros., for rebuilding part of the curb and gutter on West 79th Street, could lawfully

be paid (although irregularly contracted for) if the conditions named in the letter had been complied with and lived up to. The conditions named were that the Board of Local Improvements must be satisfied that all parties acted in good faith, that the work was done at the request of someone in authority acting on behalf of the Board of Local Improvements, that the contract has been fully performed on the part of the claimant, that the work has been accepted by the City and that the amount claimed is reasonable.

In response to this we received a second letter from you in which you say that the matter has been again referred to this department for a further opinion based on the additional information furnished by the Chief Street Engineer.

The letter of the engineer which the Board of Local Improvements had before it, and which it passed on to us for our information, contained the following:

“Answering further on opinion No. 1839 of the Honorable Corporation Counsel in regard to bill for rebuilding curb and gutter; the contract for paving 79th Street from Ashland Avenue to Western Avenue was completed during the year 1924 and accepted by the Board of Local Improvements. Under the terms of that contract the obligation of the contractor, the Hedges Construction Company, ceased with the acceptance of the work by the Board of Local Improvements.

“At the time of the installation of this curb and gutter by Powell Bros., sub-contractors for the Hedges Construction Co., the engineers of this division took unusual precautions in having the contractor prepare a proper foundation for the same. Subsequent traffic, following the acceptance of the work practically destroyed a large amount of this curb and gutter and upon order from Mr. Sloan, Powell Bros. rebuilt the same late in the summer of 1925.

“There is no contract between the Board of Local Improvements, or Mr. Sloan, and Powell Bros. to do this work—there is no formal acceptance of the same beyond the fact that the work is there and the City is enjoying its use.

“My recommendation for recompense is still standing and I think payment should be made directly to Powell Bros.”

Under the facts stated in the letter of the engineer, payment to Powell Bros. would be lawful and proper. Our Supreme Court, in *McGovern v. City of Chicago*, 281 Ill. 264, held that though a contract may have been irregularly or illegally made, if it was within the power of the City to make the contract, and if the contract was performed in good faith by the contractor, and the work was accepted by the City, payment cannot be avoided.

We therefore hold that the City is bound to pay for the work in question.

(No. 6090—September 15, 1927—J. G. D.)

FILLING STATION, FRONTAGE CONSENT, PERMIT.

An applicant's right to a permit for the installation of a gasoline tank with reference to frontage consent and other requirements is fixed as of the time of making the application and meeting existing requirements, and is not affected by a change in the requirements subsequent to such compliance.

Mr. E. A. Maloney, Deputy Fire Commissioner:

You have submitted to this department application dated February 28, 1927, signed by Cornelius Callahan, Margaret Callahan, Charles Callahan and Helen Callahan for permit to install a gasoline tank on the premises known as Nos. 1405-1409 Garfield Boulevard. You have also submitted a frontage consent petition dated February 28, 1927; also

the report of the Map Department dated March 11, 1927, that the frontage consent petition contains a surplus of 12.49 feet over the amount required by ordinance. You state in your letter that after the receipt of this report the permit fee was tendered and demand made for the permit.

The report of the Superintendent of Maps was based on section 2279 of the Chicago Municipal Code of 1922 which provides that a majority of the frontage lying within lines drawn parallel to and 150 feet distant from a lot or plot of ground where tanks are to be installed should be obtained. This ordinance was amended on March 16, 1927 (page 5797, Council Proceedings) by striking out the figures 150 and inserting in lieu thereof the figures 300. This amendment became effective April 24, 1927.

From the documents submitted to us, it appears that this petition was presented to you prior to the passage of the amendment to the ordinance, and that the Superintendent of Maps reported that said petition contained the consent of the owners of a sufficient frontage under the then ordinance.

However, a permit was not issued. The ordinance was subsequently amended by striking out the figures 150 and inserting in lieu thereof the figures 300. The frontage consent petition does not contain a requisite frontage to meet the requirements of the amended ordinance.

No permit having been issued, the question now is whether the applicants are entitled to a permit under the ordinance existing at the time the application was made or whether they must meet the requirements of the amended ordinance.

In the case of *People v. Lueders*, 287 Ill. 107, the court said, at page 117:

“There can be no doubt, we think that the law was correctly stated in *Lewis v. Commissioners of Marshall*

County, 16 Kan. 102, as follows: 'As a general rule, when a duty is at the proper time asked to be done and improperly refused to be done, the right to compel it to be done is fixed and is not destroyed by the lapse of time within which, in the first place, the duty ought to have been done.' "

In the case of *Blocki v. Krueger Bros.*, 121 Ill. App. 357, the court held that where a municipal ordinance requires that a permit shall issue after certain prescribed conditions have been complied with, it is improper when such conditions have been complied with for the Commissioner to refuse to issue a permit, and on page 362 the court says:

"When the ordinance, after providing that the applicant shall procure the written assent of certain owners, proceeds to require the filing with a certain officer of an affidavit in a particular form to the execution of the signatures and the claim of ownership, we think the proper construction of it makes that affidavit at least the *prima facie* evidence of compliance with the precedent condition, and that if the official or his authorized representative accepts and certifies the assents as sufficient in number and character, he cannot thereafter be heard to deny that sufficiency as a reason for not granting the permit."

In the case of *Paffendorf v. Lyndhurst* (N. J.) 129 Atl. 389, the court held that where, at the time a relator applied for a permit for the erection of a garage, he had complied with the Building Code, and his plans were approved by an inspector of buildings, and there was no preventive ordinance, the municipality could not, while a contemplated zoning ordinance was pending, and with its adoption in view, adopt a resolution prohibiting an inspector from granting permits, except for dwelling, thus putting a zone ordinance in force before it was adopted and depriving relator of right to issuance of permit.

The applicants herein, having presented a proper application, also a sufficient frontage consent petition, and hav-

ing also tendered to the city the necessary fees for the issuance of the permit, all before the passage of the amendment to the ordinance, were then entitled to a permit. The fact that no permit was issued and that the ordinance was subsequently amended has no effect upon the status of the applicants. They were then entitled to a permit and are now entitled to a permit.

We respectfully recommend that a permit be issued.

(No. 6091—September 15, 1927—R. N. L.)

1 PERSONAL INJURIES, AUTO-PATROL, LIABILITY.

Police officers, although appointed by the City, are not municipal but state officers and therefore the City is not liable to a person who has been injured through a collision with an auto-patrol operated by policemen, regardless of whether they are negligent or not.

2 POLICE POWER, NATURE.

In the exercise of the police power the State is performing a governmental and not a municipal function.

Hon. Michael Hughes, Superintendent of Police:

You request an opinion relative to the liability of the City of Chicago for the alleged accident to one Hugh Rodwell, 4043 Fillmore street, Chicago, about 10:15 P. M. on September 2, 1927. Your report states that said Hugh Rodwell at the time of said accident was a passenger on a southbound Crawford avenue car; that auto patrol No. 45—21st District, had just drawn up and stopped in front of the entrance to the garage to allow said street car to pass before backing into the garage; that said Hugh Rodwell was standing on the rear platform of said southbound Crawford avenue car and about 75 feet south of Fillmore street; and that said Hugh Rodwell put his head out and

same collided with said auto No. 45. In my opinion, the City of Chicago is not liable for any claim for the reasons hereinafter stated.

Wholly independent of the question as to who was at fault, the law is well settled that the City is not liable for any torts committed by its policemen, the reason being that our Supreme Court has held that the City, in the exercise of the police power is performing, not a *corporate* function, but a *governmental* function imposed upon it, regardless of its own wish or consent, by the state, and that, for that reason, police officers, although appointed and in a certain sense controlled by the City, are *not municipal*, but *state* officers, for whose acts the City is in no wise liable. *Wilcox v. City of Chicago*, 107 Ill. 334; *Culver v. City of Streator*, 130 Ill. 238; *Craig v. City of Charleston*, 180 Ill. 154; *City of Chicago v. Williams*, 182 Ill. 135; *Johnston v. City of Chicago*, 258 Ill. 494.

In the case of *Culver v. City of Streator*, *supra*, our Supreme Court said: "Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in discharge of their duties." After citing a number of authorities in support of that proposition, the court continues:

"The ground upon which the foregoing cases, and many others of a like nature, are admitted as exceptions to the general rule of corporate liability, is, that in those matters the city acts only as the agent of the state, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which it derives some special or immediate advantage or emolument in its corporate or private character.

"The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city,

therefore, is not liable for the acts of its officers in attempting to enforce such regulations.”

In *City of Chicago v. Williams*, 182 Ill. 135, the court said:

“Police officers are not agents or servants of the city appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the non-feasance or misfeasance of the officers of its police. There is an implied or common law liability for the negligence of municipal officers in the performance of *corporate* acts, which have relation to the management of the *corporate* or *private* concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their *public capacity* in the discharge of duties imposed by law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.”

Nor will the fact that the automobile which struck Mr. Rodwell was owned by the City, render the City liable. For the law is settled, in this state, that the owner of an automobile is not liable for any damages done by the same, when operated, even with the owner's consent, by another person, unless such person was then an agent of the owner and engaged in doing *his* business (*Arkin v. Page*, 287 Ill. 420); and the police, as we have seen, are neither agents of the City nor engaged in its business, in a legal sense.

For the reasons above set forth we are of the opinion that the City is not liable on this claim.

(No. 6092—September 16, 1927—G. F. M.)

1 RETIREMENT BOARD, MEMBERS, ELECTION.

In the City of Chicago members of the Retirement Board are elected triennially commencing with December 1, 1921.

2 RETIREMENT BOARD, POLICE MEMBERS, ELECTION.

Two members of the Retirement Board representing the active policemen must be elected in 1927 and triennially thereafter.

3 RETIREMENT BOARD, NEW MEMBERS, ELECTION.

The newly created member of the Retirement Board under the Amendatory Act of 1925 was elected only for a period until the next regular election in 1927.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the date of the expiration of the term of the additional Trustee elected from among the members of the Police Department holding the rank of Lieutenant, or higher, and who was elected pursuant to a certain amendment of the Act of 1921, enacted in 1925, the following is submitted:

Prior to 1925, the Retirement Board of the Policemen's Annuity and Benefit Fund consisted of five members. In 1925 the membership was increased from five to seven members by making the City Treasurer a member of the Retirement Board *ex officio*, and by designating an additional member to be selected from the policemen of the City of the rank of Lieutenant or of a rank superior to that of Lieutenant.

Black on Interpretation of Laws, section 131, cited with approval by the Supreme Court of Illinois, reads as follows:

"An amendment of a statute by subsequent Act operates precisely as if the subject matter of the amendment had been incorporated in the prior Act at the time of its adoption, so far as regards any action

had after the amendment is made, but it must be remembered that an amendment becomes a part of the original act, whether it be change of word, figure, line or entire section, or recasting of the whole language.''

The Policemen's Annuity and Benefit Fund Act of 1921, as amended, now provides for the election of two members of the Retirement Board who shall be policemen employed by such City, at least one of whom shall be a Lieutenant or of a rank superior to that of Lieutenant, and that such election shall be held in the third year after the year in which the Act shall come into force and effect in any City, and triennially thereafter. As the Act came into force and effect in the City of Chicago in 1921, the election of members of the Board from the Police Department must accordingly be held in each triennial period thereafter, namely, 1924-1927-1930, etc.

The election of the present additional member from the Police Department, which was held pursuant to the amendatory Act of 1925, was for the balance of the period or term of office extending from 1924 to 1927, or for the unexpired portion of the *term of office* of the newly created member.

I am of the opinion that the term of the newly elected member from the Police Department will expire December 1, 1927, and that *two* representatives from the Police Department must be elected this year in conformity with the provisions of the Act as amended.

(No. 6093—September 16, 1927—C. W. K.)

CLAIMS, LEAK IN WATER PIPE.

The City is not liable for alleged damages caused by a leak in a water pipe which was promptly investigated and repaired upon receipt of notice.

Hon. John S. Clark, Chairman, Committee on Finance:

Referring to Claim No. 8456, filed with the Finance Committee, and forwarded to this Department for an opinion, in regard to damage done to property at 1500 North Kildare avenue, on account of leak in water pipe in the street in May, 1927, we desire to say that we have made an investigation of this matter, and find the leak was reported February 9, 1927.

It appears from the reports that we received from the Water Pipe Extension Department, which are hereto attached, that the Water Pipe Extension Department received notice of the leak at about 9:45 a. m. on February 9, 1927, and Investigator Garrity was dispatched to the location at 1500 North Kildare avenue. Mr. Garrity found that there was two or three feet of water in the basement of the building, and that the entire basement was being flooded and damaged. He immediately picked up a crew that was in charge of caulker Charles Kane, who arrived at 1500 North Kildare avenue, at about 10:15 a. m. Mr. Kane shut down the buffalo box at the above number, but this did not stop the leak. He then shut down the section in order to stop the flow of water. The section was shut down at about 11:15 a. m., and the flow of water stopped. Assistant Foreman Holland then took charge of the crew and upon excavation found that the service pipe was broken off at the tap, and he repaired same. Mr. Holland also found that the house drain was laid in the same trench and directly over our service pipe. He was compelled to break out a portion of the house drain, and

found that one of the lengths of the house drain, which was located about ten feet from the main sewer, was partially stopped with a large stone, and that the house drain was not taking over 20 per cent of the water that was being discharged from the leak at the service pipe.

A period of less than two hours elapsed from the time that the leak was reported to the Water Pipe Extension Department until the men were there ready to repair the leak.

McQuillin on Municipal Corporations, volume 8, pages 82-87, states:

“In all sewer or water main cases cited by the plaintiff, in which the city was held liable, there was either evidence of actual neglect in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipes were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system.”

In *City of Chicago v. Rustin*, 99 Ill. App. 49, the court held as follows:

“In order to charge the city for neglect in the matter of the sewer, it is necessary to (that it) appear in what the neglect consisted. * * * It is not shown by the evidence that the sewer was not of sufficient size, or that there was any defect in its construction. * * * *The city is not an insurer of the absolute safety of improvements constructed by it.* It is sufficient if it exercises reasonable care and skill in their construction.”

In *Selz, Schwab & Co. v. City of Chicago*, 202 Ill. 545, the court, at page 549, said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep

in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such inspection, they should have been alleged."

In the case of *Terry v. The Mayor*, 8th Bosworth 510, the court said:

"No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective. As they were in long before the damage in this particular matter, they must have been originally strong. * * * If the pipes were originally sound there was no proof of want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of discovering it upon the party."

The mere bursting of a water pipe is in itself no evidence of negligence on the part of a municipality. The City is not required by law to so construct its water mains that accidents are impossible. All that is required is to use ordinary care to keep its water mains ordinarily safe under all circumstances. What is ordinary care is a question of fact to be determined from the circumstances of the particular case.

It will be noticed that in the house drain pipe there was found a large stone, which, in the opinion of the Assistant Foreman, reduced the capacity of the house drain to about 20 per cent of its actual capacity.

We are therefore of the opinion that the City is not liable for the damages claimed, and herewith return all papers pertaining to same.

(No. 6094—September 19, 1927—L. H.)

CIVIL SERVICE, LABORERS, DISCHARGE.

Laborers do not occupy the same status as other Civil Service employees but may be discharged or laid off in the discretion of the appointing officer or head of a department without assigning reasons.

Hon. Donald S. McKinlay, Alderman 19th Ward:

We are in receipt of your letter of recent date concerning the status of laborers under the Civil Service Law. You state, among other things, that you feel that the law gives such employees some preference over temporary employees.

The Civil Service Act does not accord the same rights to laborers in the City's service that it does to other Civil Service employees. Section 10, relating to appointments, requires certification according to the applicant's standing upon examination, "except that in cases of laborers, where a choice by competition is impracticable, said Commission may provide by its rules that the selections shall be made by lot from among those candidates proved fit by examination." Again, in section 12, relating to removals, written charges and hearings thereon, it is provided that "nothing in this section shall be construed to require such charges or investigation in cases of laborers * * *."

Section 4 of the Civil Service Act directs the Commission to make rules for examination, appointments and removal to carry out the purposes of the Act, and under that authority it has adopted section 4 of Rule X, which reads as follows:

"Discharges or removals or layoffs of persons employed as laborers may be made by appointing officers or heads of departments for their own reasons and without regard to seniority of certification, and shall immediately be reported in writing to the Commission. Discharges or removals of laborers shall eliminate such

persons as eligibles. Persons laid off as laborers may be reinstated regardless of seniority when vacancies occur."

The above is copied from the rules adopted on November 15, 1925, but it was in force many years before that. Its legality has never been questioned. It is to be presumed that the necessities of the service require that such latitude should be given to the head of the department.

You will see from the above that the Commissioner of Public Works was within his rights when he laid off the men you speak of. He probably had reasons which he considered sufficient, and these reasons cannot be inquired into by reason of the rule above quoted.

(No. 6095—September 20, 1927—L. H.)

SALE OF LANDS, PURCHASE BY CITY, TAX AGENT.

In the sale of lands for delinquent special assessments, property registered under the Torrens law should be permitted to go to forfeiture where the City's claim amounts to \$25.00 or less, and in default of other bidders on everything above \$25.00 the tax agent may purchase the property. In case of property not registered, the purchase may be made where delinquency amounts to \$3.00 or more. The City tax agent may depart from this course whenever the actual conditions warrant it.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of the usual request for advice as to the policy which should be pursued at the sale of lands for delinquent special assessments which is about to begin.

We are informed by the City's real estate agent and the City's tax agent that the methods employed during the

last few years have resulted satisfactorily and we see no reason why the policy thus inaugurated should not be pursued during the current year's sale. The fact that the sale is to take place early as was the case last year will probably result in the necessity of purchasing more than usual, but no loss should be occasioned thereby since such parties as will be in default on account of the early sale will undoubtedly redeem their property within a short time.

Therefore, restating what we advised last year, we recommend that property registered under the Torrens Law should be allowed to go to forfeiture where the City's claim amounts to \$25.00 or less. On everything above \$25.00 the City's tax agent should buy in the property at the sale in default of other bidders. As to property not registered under the Torrens Law, we recommend purchase in case the amount of the delinquency is \$3.00 or more.

What we have always said with regard to the discretion of the City's tax agent should hold good this year as usual. It will be proper for him to depart from the course indicated at times when he finds that conditions are such as warrant a departure from our recommendations.

(No. 6096—September 22, 1927—G. F. M.)

PENSIONS, FOREIGN GUARDIAN, PAYMENT.

In case of a conservatorship in Chicago and also a special guardianship in another city and state to which the pensioner has transferred his or her residence, payment of the pension can be made upon the special guardian obtaining an order from the foreign court authorizing the Retirement Board to pay him the monthly pension for his ward and the filing of a certified copy of such an order with the Board together with a statement from the ward why the residence was transferred from Chicago.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion in the matter of the pension payable to Mrs. Cecelia Sweet, the following is submitted:

Your letter states that Cecelia Sweet has a conservator in Chicago and also a special guardian at St. Paul, Minnesota. You ask to whom her pension payments shall be made.

I took this matter up with Judge Horner of the Probate Court here and Judge Horner suggested that the special guardian at St. Paul be requested to have the court there enter an order, authorizing and empowering the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago, to pay to the special guardian at St. Paul the amount of the monthly pension payable to Cecelia Sweet; that a certified copy of that order be filed with you, together with a written statement signed by Mrs. Cecelia Sweet as to why she transferred her residence from Chicago to St. Paul. Judge Horner suggested that, if you had these documents in your records, your Fund would be protected in the making of its payments.

(No. 6097—September 22, 1927—G. F. M.)

PENSIONS, REFUND, PAYMENT.

A refund of a deceased employee's salary contributions is payable to the heir or heirs designated in the table of heirship as the sole heirs at law where the deceased left no child or children.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion in the matter of the John W. Donnellan refund, the following is submitted:

Your letter states that John W. Donnellan, a former employee of the City of Chicago and a participant in your fund, died May 24, 1927, leaving no widow or children under the age of eighteen years to whom an annuity would be payable under section 39 of the Municipal Employees' Annuity and Benefit Fund Act; that there has been filed with you a copy of the table of heirship as entered in the Probate Court of Cook County, which table shows that John W. Donnellan left him surviving only one heir at law, namely, a brother, Christopher P. Donnellan, 4225 North Troy street, Chicago; that Attorney Joseph M. Connerly, representing Mathew T. McDonough, executor of the estate of John W. Donnellan, deceased, has served you with notice not to pay said refund to anyone excepting Mathew T. McDonough, the executor, until the legal rights of all parties have been adjudicated, excepting at your peril.

Section 39 of the Municipal Employees' Annuity and Benefit Fund Act, in paragraph (E) thereof, specifically provides that such refund, if there be no children to whom such refund can be paid, shall be "refunded and paid to

the heirs of such Municipal Employee according to the law pertaining to the estates of deceased persons."

There is no provision in the Act authorizing or empowering your Honorable Body to pay this refund to an executor, but such refund must be paid to the heirs of the deceased.

I am of the opinion that John W. Donnellan, having left him surviving only one heir at law, his brother, the refund of his salary contributions now awaiting disposition by your Honorable Body should be paid to the heir designated in the table of heirship as being the sole heir at law.

(No. 6098—September 23, 1927—F. J. V.)

1 CIVIL SERVICE, PROMOTIONAL EXAMINATION,
ELIGIBLES.

Promotional examinations under the Statute are open to all members of the next lower rank engaged in the same line of service as determined from existing classification of the offices and places of employment regardless of the respective departments in which the employees may be working; all promotions being made on the basis of ascertained merit and seniority of service.

2 CIVIL SERVICE, PROMOTIONAL EXAMINATION,
DEPARTMENTS.

A promotional examination which limits the eligibility and classification of Civil service employees to a department is unlawful.

3 CIVIL SERVICE, CLASSIFICATION, DEPARTMENT.

The Civil Service Commission has no power to classify by departments, but must classify employees according to branches, classes, grades and ranks for the entire City; under which classification all citizens are eligible by public competitive examination.

Hon. Thomas J. Houston, President, Civil Service Commission:—

We are complying with your recent request for an opinion "on the right of the Civil Service Commission to call

promotional examinations and post eligible lists by departments," the instant case being "a promotional examination for senior clerk, comptroller's office, with only junior clerks employed in said office eligible for promotion."

Two propositions are involved here: (1) the rights of all Civil Service employees in the same line of service to participate in such examination; and (2) the power of the Commission to make such classification by departments in the same line of service. We shall consider these propositions in the order stated.

In an opinion involving the right of assistant chief clerks to take the promotional examination for chief clerk as against the declared purpose of the Commission to recognize as eligible only the head clerks, we took occasion to say, what is primarily applicable here, viz.:

"The test of eligibility to try for promotion in the civil service is plainly prescribed by section 9 of the Civil Service Act as follows: 'All examinations for promotion *shall* be competitive among such members of the next lower rank as desire to submit themselves to such examination.'

"The right here given to every member of the next lower rank; engaged in the same line of service, is given in language so plain and unequivocal as to admit of no possible construction by any court or commission that would in any degree limit or circumscribe that right. It is not within the power of the Civil Service Commission itself, by rule or administrative act, nor in the appointive power by delegation of authority from the Commission, to deprive the Civil Service employee of this right. Any such rule or act of the Commission, or delegation of authority would be illegal and void under the Civil Service Act. *People ex rel. Kaster v. Kearney, Commissioner*, 164 N. Y. 14, 58 N. E. 64. * * *" Opinions Corporation Counsel, 1925-1926, p. 326; Opinions Corporation Counsel, 1924-1925, p. 570.

What employees in the civil service are at present eligible to take the promotional examination for chief clerk?

This must be determined from the existing classification of the offices and places of employment made by the Civil Service Commission pursuant to section 3 of the Civil Service Act, which declares that "the offices and places so classified by the Commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

The Civil Service of the City is at present divided and subdivided by the Commission into branches, classes, grades and ranks. All the positions affected by this opinion are embraced in the Commission's general classification of "Branch 1—Administrative, embracing positions the duties of which are principally administrative," and are placed in "Class A. Clerical, Accounting and General Office Service, embracing positions the duties of which involve auditing, accounting, recording, stenography, machine operating or any kind of general office work and supervision thereof." These positions are again subdivided into grades and ranks, but this is immaterial here. See Commisison's Rules of 1925, pp. 15, 16.

No classification of these employees is made with reference to City departments. No distinction in their lines of service is made on account of the fact that they may for the time be employed in one department or another. Indeed, the Commission by its rules recognize these positions as being the same or similar in whatever departments, for section 1 of Rule VIII expressly provides that "transfers may be made from a position in one department to a similar position of the same branch, class, grade or rank and character of work and of the same approximate pay in another department, providing the heads of the two departments concerned shall make request therefor and the same shall be approved by the Commission."

In view of the law as stated and the classification of the positions as at present existing, we are of the opinion that all civil service employees who are "members of the next lower rank" to the position of senior clerk, regardless of the respective departments in which they may be working, have the absolute right to participate in any promotional examination for the position of senior clerk in the comptroller's office, and, therefore, no examination would be legal from which they were excluded.

Compliance with the Civil Service Act is a contractual right of the civil service employee and a corresponding obligation of the City. *People ex rel. v. Coffin*, 282 Ill. 599, 610; *People ex rel. v. Stephenson*, 270 Ill. 569.

It remains to decide whether the Commission has the power "to call promotional examinations and post eligible lists by departments." As we have seen, this cannot be done under the existing classification of civil service positions and the rules of the Commission. The power to make classification is vested in the Civil Service Commission, but the courts have held that the power to classify is not one to be exercised arbitrarily. Thus "heads of departments" cannot be multiplied so as to come within the list of those offices excepted from the civil service by section 11 of the Act; a new classification cannot be made of a position which the City Council attempted to abolish and re-establish under a new name; classification of positions under the jurisdiction of the School Board is mandatory; classification of positions in the civil service must be made according to certain recognized principles. *People v. Kipley*, 151 Ill. 44; *City of Chicago v. Luthardt*, 191 Ill. 516; *People ex rel. Brennan v. Ellicott*, 243 Ill. App. 374; *People v. Errant*, 229 Ill. 56.

Section 3 of the Civil Service Act provides that classification shall be made "with reference to the examinations

hereinafter provided for." And section 6 provides that "all applicants for office or places in said civil service * * * shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character." Section 9 provides that "the Commission shall, by its rules, provide for promotions in such classified service, *on the basis of ascertained merit and seniority in service* * * *." And section 3 declares that "the offices and places so classified by the Commission shall constitute the classified civil service of such city."

It is obvious from those provisions of the Civil Service Act itself that but one City-wide "classified civil service" was intended by the Legislature, to which all citizens should be eligible by public and competitive examination, and that in such classified civil service all promotions must be made on the basis of ascertained merit and seniority in service. To limit eligibility to departments would be to create as many independent civil service systems as there are departments in the City. Not only is there nothing in the Civil Service Act to support such a classification, but we think such division of the classification or administration of the civil service into departments is opposed by both the letter and spirit of the Act. This view is sustained by the Civil Service Commission in the long established rule of classification, section 3, which provides for "classes of service" not by departments but "classes, each including offices and places of employment of *the same relative kind and character of work* (designating the same)." We believe that limiting the classification and eligibility of civil service employees to departments violates the specific rule of section 9 of the Civil Service Act that promotions in the classified service shall be made on the basis of seniority in the service as well as ascertained merit. One in

the service of a department for a short time may become eligible to a promotional position in that department over another who has many years more of service in the same general line and character of work in another department.

Section 9 of the Civil Service Act provides that "all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations." The Civil Service Commission by section 5 of Rule 1, declares that "rank shall be held to include only those offices and places of employment performing the same particular kind and character of work and of equal authority and precedency." In construing a substantially similar rule of the Commission the Supreme Court said:

"Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, *in the same line of service*. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to the duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line. In our opinion the proper construction of these rules is that promotion shall be made upward—that is toward the higher salaried place from the grade (rank) next below in the same line of employment—and that the same line of employment *means those positions in the various departments* the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position." *People v. Errant*, 229 Ill. 56, pp. 64, 65.

Note the language, "the same line of employment means those positions *in the various departments*" (not department). The Civil Service Commission's limit of eligibility in promotion to those in the civil service of a single department would be contrary to the foregoing constructive

opinion of the Supreme Court and in conflict with the express provision of section 9, that "all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations."

Finally, the proposed classification and promotion by departments is new and opposed to the practical construction put upon the Civil Service Act by the Civil Service Commission itself for an unbroken period of many years. Such proposal would limit the number of positions and places of employment in the civil service to which all members in the same line of employment are eligible and would curtail their legal right of promotion thereto. In this respect we think the *Kipley case* is applicable. That was an attempt to create numerous heads in a department, thereby taking them out of the civil service. The Supreme Court denied this power and said:

"The object of the law is to provide for appointment to office upon the basis of merit and fitness, as ascertained by competitive examinations which are open and free to all." *People v. Kipley*, 171 Ill. 44, p. 81.

We are of the opinion that classification of positions and limitation of eligibility thereto by departments would be irregular and illegal.

(No. 6099—September 27, 1927—G. F. M.)

PENSIONS, COMMON LAW MARRIAGE.

A common law marriage entered into prior to 1905 is valid in Illinois and entitles a widow of a policeman who claims under a common law marriage in 1900 to a pension.

Retirement Board, Policemen's Annuity and Benefit Fund:

In reply to your request for an opinion as to the pension rights of a common law widow, the following is submitted:

Your letter states that one Jessie Lewis has applied for a pension as the widow of Thomas Lewis, a deceased policeman; that Thomas Lewis retired from the Department on March 31, 1913, after twenty years of service; that the applicant and the deceased were never formally united in marriage; that in support of her application, Jessie Lewis has filed affidavits to the effect that she and the said Thomas Lewis had cohabited as man and wife for a period of over twenty years last preceding the death of Mr. Lewis; that according to the said affidavits the said Thomas Lewis and Jessie Lewis held themselves out as man and wife as far back as the year 1900; that some of the affidavits are to the effect that the co-habitation was continuous until the time of Mr. Lewis' death; that in the application of Thomas Lewis for a pension, filed May 5, 1913, he gave the date of his marriage as March 6, 1900, and the maiden name of his wife, Jessie Steward; that the applicant gives her maiden name as Jessie Stewart; and your information is that Thomas Lewis died on March 15, 1927.

Prior to 1905 common law marriages were recognized as valid and legal marriages. In the year 1905 the Legislature abolished common law marriages in Illinois, so far as concerned their validity and legality as marriages, by amending section 4 of an act entitled "An Act to revise the law in relation to marriages," approved February 27, 1874 (Smith-Hurd's Stat. 1927, ch. 89). The Amendment enacted by the Legislature added the following provision to said section 4:

"Provided, however, that all marriages commonly known as 'common law marriages' hereafter entered into shall be and the same are hereby declared null and void unless after the contracting and entering into of any such common law marriage a license to marry be first obtained by such parties who have

entered into such common law marriage and a marriage be solemnized as provided by this act in the same manner as is provided for persons who have obtained a license to be joined in marriage and are about to be joined in any such marriage.”

It will be observed that the law declaring common law marriages void specifically makes reference only to marriages “*hereafter entered into*” and does not apply to common law marriages entered into prior to the amendment of 1905.

From the information given me, it appears, both by the affidavits on file and by the admission of Thomas Lewis in his own application for pension, that the common law marriage between Thomas Lewis and Jessie Lewis occurred in 1900 and during a period of time when common law marriages were valid and legal marriages in Illinois.

I am, therefore, of the opinion that Jessie Lewis is entitled to a pension as the lawful widow of Thomas Lewis, deceased.

(No. 6100—September 29, 1927—L. H.)

1 WORKMEN'S COMPENSATION, COMPROMISE.

The Workmen's Compensation Act does not permit settlement by way of compromise.

2 WORKMEN'S COMPENSATION, DEPENDENTS.

A parent who is in the City's employ is not dependent upon a son of 18 years of age within the meaning of the Workmen's Compensation Act.

Mr. Charles E. Polzin, 8559 S. Hermitage Ave., Chicago, Illinois:

The writer made inquiry in regard to the claim for workman's compensation, which you made on account of the death of Donald W. Polzin, your son. It seems the difficulty in this case is that your boy was only eighteen

years of age when he met his death, and that there are no dependents who can lay claim to such compensation. So far as you are concerned, you are now in the City's employ, and it cannot be said, in any sense of the word, that you were dependent on his earnings.

You must understand that the Workman's Compensation Act does not permit of settlement by way of compromise, as is done in an ordinary lawsuit. The amounts that are to be paid are absolutely fixed by statute. In a case of this kind, there being no dependents, the statute allows the payment of \$150.00 for funeral expenses. The only way that this amount could be increased would be by a finding to the effect that somebody was dependent on the deceased.

Therefore, we regret to say that we are unable to assist you in any way farther than has been already indicated by the City's Agent, who handles such matters.

(No. 6101—September 29, 1927—L. H.)

1 FRONTAGE CONSENT, CHURCH TRUSTEES, FILLING STATION.

Church authorities have no power to consent to the location of a filling station within 300 feet of the church; and if such a consent has been given, it should be disregarded.

2 FRONTAGE CONSENT, CHURCH.

A building used only occasionally for religious services is not a "church" within the meaning of section 2279 of the Municipal Code governing the location of filling stations.

3 MUNICIPAL CODE.

Section 2279 governing the location of filling stations applies to property which is regularly used for religious services and not to property which is only occasionally so used.

Hon. Albert W. Goodrich, Fire Commissioner:

In your letter of September 7, 1927, you stated that written application had been made to install two tanks for

a gasoline filling station at 13021 Brandon avenue, and you ask for advice concerning the disposition to be made of such application.

Your letter states that frontage consents were filed as required by ordinance, and that the Superintendent of Maps verified these and reported a surplus of 79.79 feet. You say that such report indicates that the tanks are to be located within sixty feet of the nearest boundary line of a lot or plot of ground used for a church. The permit was withheld by you for this reason, notwithstanding the fact that the church, by its board of trustees, gave consent to place these tanks for a filling station at the location referred to.

The question you ask is whether, under the circumstances, a permit should be issued in case a council order directing the department to issue same is passed. The question of whether the consent of the church trustees can overcome the provision of the ordinance which prohibits the location of such tanks within 300 feet of a church has frequently been passed on by this department. We have always held that the giving of consent by the church authorities has no legal effect. Hence, if that were the only question in the case, we would have to advise you that such permit could not issue even if the council passed an order requiring that.

While this matter was pending in this department, however, information was brought to us to the effect that the edifice which is called a church is in fact used only occasionally for religious meetings. There have been no regular services held therein at any time, and at present it seems that the minister who occasionally holds services there has another church for his regular congregation.

Under these circumstances the real question in the case is whether this building is to be regarded as within the

meaning of a church as the word is used in section 2279 of the Chicago Municipal Code of 1922 governing the installation of such tanks. In cases where a question of exemption from taxation has arisen, our Supreme Court has been very strict about the use of property, and has held against allowing the exemption if the building is used for other purposes as well as for religious or educational purposes. We believe that at least as strict a rule must be followed in the case of withholding the use of property for filling station purposes, since this is in derogation of common law rights. We are not disposed to say that a building is used for church purposes when there is only occasionally a religious meeting therein.

We, therefore, beg to advise you that in case the City Council should pass an order directing you to issue a permit for a filling station at the location mentioned, it will be proper to do so.

(No. 6102—September 29, 1927—L. H.)

1 ORDINANCE, AMENDMENT.

After the passage of an ordinance it is subject to amendment under the statute at the next meeting of the City Council.

2 BOND ISSUE ORDINANCE, NATURE.

An ordinance authorizing the issue of bonds for a specific purpose such as the purchase of a site and the construction of incinerators has the same effect as an appropriation.

3 INCINERATOR ORDINANCE, SCOPE.

The Incinerator Ordinance of June 29, 1917, together with the appropriations made for refuse disposal etc. contemplate the purchase of sites and the construction of more than one incinerator.

4 INCINERATOR, 100-TON CONTRACT.

The contract for 100-ton incinerator to be erected on a site which cannot be used for such purposes under the Zoning Law is inoperative and void.

5 GENERAL CORPORATE FUND, PUBLIC IMPROVEMENT.

A part of the General Corporate Fund may be used in financing a public improvement in the absence of statute to the contrary.

6 CONTRACTS, INSUFFICIENT APPROPRIATION.

Under the authority of the City Council it is lawful to enter into a contract which cannot be paid for in full from current appropriations, if the specification and contract state that the amount to be drawn therefor will not exceed existing appropriations.

7 APPROPRIATIONS, UNENCUMBERED OR UNEXPENDED BALANCE, CONTRACT.

A contractor with the City in order to be protected is only required to see that the unencumbered balance in an appropriation is sufficient to cover his contract.

8 APPROPRIATIONS, TRANSFER.

It is permissible under section 2, article VII of the Cities and Villages Act (par. 101, chap. 24, Smith-Hurd's Stat. 1927) to transfer funds "within a department" from one appropriation to another.

9 PUBLIC OFFICERS, CONTRACTS, APPROPRIATIONS, UNENCUMBERED BALANCE.

It is the duty of public officials to keep contracts entered into within the unencumbered balance of an appropriation from which payment therefor is expected.

10 COMMISSIONER OF PUBLIC WORKS, INCINERATOR CONTRACTS.

The Commissioner of Public Works under present ordinance and appropriations for incinerator purposes is limited to the amount appropriated and cannot contract on behalf of the City with a view to require additional appropriations or making available funds which are not duly appropriated; but this does not prevent entering into a contract for an additional incinerator if there are enough funds to pay part of its purchase price under a direct authority from the City Council to make such a contract where its completion must extend beyond the current year. In such a case the contract must specify that only the amount available by appropriation or by transfer will be paid during the current year.

11 CHICAGO UNION LIME WORKS CONDEMNATION.

The pleadings on the part of the Chicago Union Lime Works Company fail to claim insufficient appropriation and therefore said Company must look to future appropriations, and keep its property until compensation therefor is duly made.

12 WORDS AND PHRASES.

The term "other expenses" in an appropriation ordinance does not mean the same as "additional expenses."

Hon. Richard W. Wolfs, Commissioner of Public Works:

Under dates of September 1st and September 19th last past you made some inquiries regarding incinerator plants and sites for dumps, and the status of contracts already made and others proposed, with reference to the liability of the City and the availability of appropriations therefor. We answered these letters respectively under dates of September 8th and September 20th.

In answering the letters, we took into account the following clause, which was attached to the items of appropriation designated as 481-X-1 and 481-X-3, appearing on page 5299 of the Council Journal of January 19, 1927:

"The character and extent of such expense shall be determined by the City Council, and this appropriation or any part thereof shall be expended only after further order of the City Council directing such expenditure."

It appears that at its meeting on January 26, 1927, (which was the next meeting of the Council and therefore within the time fixed by statute for amendments), the City Council amended the annual appropriation ordinance by eliminating the above clause from each of the said two items. This was not called to the writer's attention until after our letters of September 8th and September 20th were sent to you. The elimination of this clause makes a difference with respect to the availability of the two items of appropriation in question, and it is necessary to revise the opinion given in our said letters. In order to avoid confusion, we deem it better to withdraw our letters of September 8th and September 20th, and to ask you to

regard this letter as the opinion of this department on the whole subject-matter.

In your letters of inquiry you say that the City is contemplating the construction of a 600-ton incinerator plant on Branch street just south of Division street; that it already has a contract for the installation of an incinerator of 100 tons capacity with the Rust Engineering Company; that it also has a contract with the Warner Construction Company for the excavation work and preparation of the foundation; that the contracts cannot be carried out on the site selected for the 100-ton incinerator because the Zoning Board of Appeals has ruled that it would be contrary to the Zoning Ordinance.

You ask first, whether it would be lawful to advertise and let a contract for the proposed 600-ton incinerator while the present contracts are still in force; second, what effect the present contracts will have on the unincumbered balance of the Refuse Disposal bond issue out of which the new work will have to be paid; third, what effect the condemnation proceedings now pending for the property of the Union Lime Works Co. for use as a dump will have on the availability of the funds of this bond issue for the proposed 600-ton incinerator; fourth, what is necessary to make available for the 600-ton incinerator as much as possible of the three appropriations (481-X-1, 481-X-2 and 481-X-3) already made for incinerators and dump purposes; and finally, you wish to be advised as to what steps would be necessary to dispose of the contracts with the Rust Engineering Company and the Warner Construction Company.

We are informed that you have definitely decided to abandon the construction of the 100-ton incinerator which was originally contemplated; that the contract with the Rust Engineering Company was for \$196,000 as the ap-

proximate cost, that with the Warner Construction Company for \$36,115, making a total of \$232,115; that these contracts were let in November, 1925, under an appropriation made June 30, 1925; and that the cost of the proposed 600-ton incinerator will run up to considerably more than at present appropriated therefor, and with other expenditures from the Refuse Disposal bond fund may exceed the entire balance in such bond fund.

In answer to your first question, as to whether it would be proper to advertise and let a contract for the proposed 600-ton incinerator while the present contracts for a 100-ton incinerator at another site are in force, we beg to advise you that there is no legal obstacle to such a course.

The contracts you speak of were entered into by virtue of authority given on June 30, 1925 (Council Journal, p. 842). The particular appropriation under which the Commissioner of Public Works acted was worded as follows:

“For the construction of a refuse destructor composed of building, furnaces and appurtenances thereto, together with engineering, inspection and incidentals\$300,000.00”
481-X-1

The same appropriation, with very slight changes, appears in the appropriation bill for the year 1926, and again in the appropriation bill of 1927. There were additional appropriations from this bond fund in 1926 and 1927, and since we will have occasion to refer to these later, we will quote all of the 1927 appropriations from the Refuse Disposal Bond Fund at this point. They are as follows:

“From the REFUSE DISPOSAL BOND FUND (January 30, 1925), the following amounts:
“For the construction of refuse destructor, including buildings, furnaces

	and appurtenances thereto, together with engineering, inspection and 481-X-1 incidental expenses	\$300,000.00
	“For the purchase of sites for dumps for refuse disposal, together with 481-X-2 the necessary incidental expenses..	300,000.00
	“For other expense in connection with the construction of refuse destructors 481-X-3 and purchase of dump sites.....	343,200.00
	“For expense of legal opinions, print- ing and advertising in connection 481-X-4 with the sale of bonds	1,500.00
	Total.....	<u><u>\$944,700.00”</u></u>

While it may be argued from the wording of appropriation 481-X-1 that the City Council intended to provide for only one incinerator plant, since “refuse destructor” appears in the singular, while “buildings,” “furnaces,” “sites,” “dumps,” etc., appear in the plural, such an interpretation would be inconsistent with the situation, since the contracts mentioned, which were entered into a full year before the making of the appropriation, would not require the \$300,000.00 appropriated. It would also be inconsistent with appropriation 481-X-3, which is for “other expense” in connection with the construction of “refuse destructors” and which impliedly gives the Commissioner of Public Works power to contract for more than one; and it would be inconsistent with the ordinance providing for the bond issue (see Council Journal of January 30, 1925, page 4663), which contemplates the “purchase of sites and construction of refuse incinerators and destructors,” etc. Such bond ordinance and its approval by the voters amounts to an appropriation, and under it the City Council would be at liberty to authorize one or more incinerators as may be deemed necessary. Nearly, if not quite all, proceeds of the bond issue of \$1,000,000.00

are appropriated by the items set forth above. If the first item were so construed as to preclude the building of more than one incinerator the Council would have cut itself off from the authority to use the money in conformity to the provisions of the bond ordinance.

In addition to all this, it would be a very narrow construction of the appropriation ordinance to say that where words in the singular number are used it would limit the use of the appropriation to a single incinerator or a single refuse destructor. The general rule of construction is that such words will be implied to relate to more than one under the conditions mentioned.

We, therefore, conclude that it is within the power of the Commissioner of Public Works to authorize a contract for an additional incinerator if the balance remaining in the appropriation is sufficient or if there are any other moneys available. We believe that it was the intention of the City Council to make appropriation 481-X-3, for the sum of \$343,200.00 available to the Commissioner of Public Works for this purpose. The appropriation is peculiarly worded, and the phrase "other expenses in connection with the construction" would raise a serious doubt if it were not for the fact that the comprehensive wording of appropriation 481-X-1 is such that there can be no "other expense" except such as might better have been described as "additional expense."

If there is not enough money in these two appropriations the Commissioner of Public Works can go no further without Council authority. He cannot bind the City on a contract which is not fully appropriated for, cannot make funds available that are not expressly appropriated for the purpose, and cannot make a contract which will require additional appropriations in subsequent years,

On the other hand, the City Council, by means of a transfer, may make available for this purpose the moneys in appropriation 481-X-2, and it would even be possible to make a transfer from some of the appropriations drawn against the general corporate fund. There is nothing in the law which prohibits a public improvement from being financed partly from a bond fund and partly from the general corporate fund; and a transfer of funds so that they can be expended by the Commissioner of Public Works for this purpose would be a transfer "within the department" as we have from time to time construed these words in section 2 of article VII of the Cities and Villages Act.

Even without exhausting all these means of providing an adequate fund, a contract for an additional incinerator may still be entered into if there is some money available by an antecedent appropriation and the City Council will give you direct authority to enter into a contract which will not be completed during the current year. In such an event, however, care must be taken to specify that only the amount available by appropriation or by transfer as above indicated will be paid out during the current fiscal year. This department has frequently held that a contract for an improvement which cannot be paid for in its entirety from the current appropriations, but which can be partly paid for therefrom, may nevertheless be entered into with due Council authority if the specifications and contract state that the amount to be drawn therefor from the general fund for the current year does not exceed the appropriation. Hence, if it be deemed advisable to do so, the City Council, even though the contracts for the 100-ton incinerator may be in force, may lawfully authorize you to proceed to advertise for bids and to let a contract for such an incinerator as you desire to build.

Turning now to the question of what effect the present contracts will have on the unincumbered balance of the Refuse Disposal Bond Fund, we understand your question to refer to the balance which would remain in case the entire sum of \$232,115.00 were to be regarded as incumbered or segregated on account of the pending contracts for the 100-ton incinerator. If that is what you refer to, we beg to advise you that the contracts you have already entered into will have no effect whatever on the said unincumbered balance.

A contractor who undertakes work for the City is bound to take notice of the condition of the appropriation out of which he is to be paid. The officer who acts for the City is bound by law to keep a contract which he lets within the unincumbered balance. Hence, the only thing the contractor must see to is whether there is an unexpended balance in the appropriation sufficient to cover his contract or such part of same as is to be paid for during the current fiscal year. If there is such adequate unexpended balance in the appropriation at the time he enters into the contract he is protected and does not have to watch the fund thereafter, the City being liable in case it spends the money for other purposes.

Since it is the intention to abandon the 100-ton incinerator project, the entire appropriation will be free as soon as appropriate action is taken to dispose of that. This department at one time indicated that the decision of the Board of Appeals with reference to the site renders the pending contracts invalid. (See letter of July 27, 1926.) But, by reason of matters which we mention below, we deem it advisable for you to await the action of the City Council before declaring said contracts canceled.

The third question is as to what effect the condemnation proceedings now pending for the property of the Union

Lime Works Co. will have on the availability of the funds in appropriation 481-X-2.

At the present time appropriation 481-X-2 is not incumbered in any way. No contract has been made, and no judgment has been entered which need be provided for. The City Council may make a transfer at any time that will make this fund available.

There was an offer of \$350,000.00 made for the property of the Union Lime Works. Only \$300,000.00 was appropriated. If the Chicago Union Lime Works Co., in its pleadings, had set up that there was not a sufficient appropriation, we would have advised the City Council to increase the appropriation and to hold it intact. But, since there was no such point made, the said Company is not now in a position to complain about the lack of an appropriation or the insufficiency of the appropriation, but will have to content itself with holding on to its property until the money is available, or, if not available within the time set by the Court, to keep the property altogether.

There is at present no judgment of condemnation. It will not be possible to secure such a final order inside of from six weeks to two months. Such order will contain the usual provision authorizing the City to elect whether it will take the property or not. If it is desirable to put off the acquisition of the property until after the beginning of the next fiscal year, this can be arranged. If that is not desirable, then it would not be wise to reduce the fund appropriated therefor by asking expenditures therefrom for any other purposes. The preservation of this fund at this time is purely a question of expediency.

The next question, as to what is necessary to make available as much as possible of appropriations 481-X-1, 481-X-2 and 481-X-3 for the 600-ton incinerator, has al-

ready been answered. We merely repeat here that, to the extent that these are not incumbered by pending contracts, appropriations 481-X-1 and 481-X-3 are now available to the Commissioner of Public Works without any Council action, and appropriation 481-X-2 may be made available by the City Council at any time by making a transfer in the manner provided by law. The City Council can release the balance of appropriation 481-X-1 by canceling the contracts which now incumber it.

The last question to be answered is your inquiry with reference to the steps to be taken to dispose of the contracts for the 100-ton incinerator.

The decision of the Zoning Board of Appeals to the effect that it would be unlawful to erect an incinerator plant on the site for which contracts had already been let, in our opinion rendered those contracts void. It would probably have been well at that time to notify the contractors at once that the contracts could not be and would not be carried out. That was not done, however, and the contractors have not yet been informed that the contracts will be treated as void.

Under these conditions we deem it advisable that the City Council should take direct action to the effect that the Commissioner of Public Works be ordered to cancel the contracts. The passage of such an order would protect you against a possible claim that you had acted against the directions of the Council, and it would also serve the purpose of a definitive cancellation of the contractual obligation.

What the result of such action will be we cannot foresee. It may be that the contractors will take our view, and merely lay claim to reimbursement for their expenses. In such an event there might be a moral obligation on the

part of the City to reimburse them. On the other hand, the contractors may claim damages for an alleged breach of contract. The defense of the invalidity of the contract may be a good defense to such an action, but we feel that it would be premature to express our views on that point at this time.

(No. 6103—October 1, 1927—S. C. A.)

PUMPING STATION, APARTMENT DISTRICT, ZONING ORDINANCE.

The erection of a pumping station in an apartment district is not prohibited by the Chicago Zoning Ordinance.

Hon. Richard W. Wolfe, Commissioner of Public Works:

You have requested an opinion whether the City of Chicago may erect an electrically operated water pumping station in the vicinity of Lincoln and Eastwood avenues.

From the plat enclosed with your inquiry it appears that the proposed site is located upon the north side of Eastwood avenue and extends easterly from the corner of the alley east of Lincoln avenue 57.65 feet.

Under the Chicago Zoning Ordinance this proposed site is located within an "Apartment district."

Under section 13 of the Zoning Ordinance the proposed improvement is classified as a "special use." Said section 13 being in part as follows:

"(a) For the purposes of this ordinance all special uses are classified as follows: Public service water reservoir—filtration plant or pumping station; (b) A special use or the extension of an existing special use may be located in any district without restriction as to the distance from any other district, provided such location or such extension will not seriously injure the appropriate use of neighboring property."

Under section 6 of the Zoning Ordinance a special use may be erected in an Apartment district. Said section 6 is in part as follows:

“(a) In an Apartment district no building or premises shall be used nor shall a building be erected, altered, or enlarged which is arranged, intended, or designed to be used for a C or M use as defined hereinafter. In an Apartment district no building or premises shall be used nor shall any building be erected, altered, or enlarged which is arranged, intended, or designed to be used except for R or A uses or *special uses* exclusively as hereinafter provided.”

The above quoted sections of the ordinance specifically provide that a pumping station may be erected within an Apartment district.

We are of the opinion that under the terms of the Zoning Ordinance the City of Chicago has the right to erect a pumping station upon the above described site.

(No. 6104—October 3, 1927—L. H.)

1 LICENSE FEE, APPORTIONMENT.

A party who is not an auctioneer, pawnbroker or other broker commencing business during any portion of a year must pay a license only for the remaining period of the current year apportioned quarterly or semi-annually according to whether the annual license fee is \$50.00 or more, or less than \$50.00; which payment must be made in advance.

2 WORDS AND PHRASES.

“Payable in advance” in the License Ordinance means the same as payable at the time of issuing and delivering the license, regardless of whether the license fee is pro-rated or not.

Hon. Morris Eller, City Collector:

Your letter of recent date in which you ask a question pertaining to the pro rating of fees as provided for in

section 2426 of the Chicago Municipal Code of 1922 was referred to the writer for consideration and reply.

The section in question provides that annual license fees shall not be divided except where the ordinance specifically provides that they should be, but that in the case of new places of business such fees shall be pro rated as set forth therein. The particular point on which you wish information is the meaning of the phrase "unless otherwise specifically provided" as used in that section. The said section reads as follows:

"No license shall be granted for a longer period than one year, except where otherwise specifically provided, and every license shall expire on the 31st day of December following the date of its issuance, except when otherwise specifically provided. No license shall be issued for any period of time less than a year or for a less sum than the full annual license fee, except when otherwise by ordinance specifically provided. All licenses for new places of business, the annual fee for which is fifty dollars or more, unless otherwise specifically provided, shall be pro-rated quarterly, and where the annual fee is less than fifty dollars, shall be pro-rated semi-annually; provided, however, that in all cases of pro-rating the applicant shall first furnish an affidavit in form satisfactory to the city collector that the said applicant was not liable for a license prior to the period for which said license is applied for. The licenses for auctioneers, pawn-brokers or brokers of any class whatsoever shall not be pro-rated. The fee for each license issued shall be collected at the time of the issuance and delivery thereof."

The obvious meaning of this section is that unless there is specific provision made for the payment of only a portion of the annual license fee the whole of it should be collected in advance or as the ordinance says "at the time of the issuance and delivery" of the license; but on the other hand when a party starts a new place of business he is required to pay only such portions of the year (a

quarter, a half or three-quarters of a year as the case may be) as may remain of the current year unless there is some provision specifically prohibiting such pro-rating.

You call attention to the sections of the Code which require license fees from bathing beaches, bill posters, florists, etc., where it is stated that the license fee shall be payable in advance, and you ask whether this means that the ordinance specifically prohibits pro-rating as provided for in section 2426.

In our opinion no such construction can be given to the words "payable in advance" as used in these various sections as will prevent you from pro-rating in the case of persons who start new places of business. The words "payable in advance" mean practically the same as the words in section 2426 which say that the license fee shall be collected at the time of the issuance and delivery of the license.

The same is true of the clause "upon payment of a license fee of \$100.00" whenever such a clause or a similar provision appears in the ordinances.

(No. 6105—October 3, 1927—F. J. V.)

THEATRES, OBSTRUCTION OF AISLES AND EXITS.

Persons who are obstructing aisles and places of exit in a theatre may be ejected therefrom or arrested by the police without warrant at the instance of the Fire Marshal.

Hon. A. W. Goodrich, Fire Commissioner:

We have your communication of the 8th ultimo, with enclosure of "report made by Battalion Chief, B. F. Fisher, concerning conditions as found by him at the

Avalon Theater, located at No. 1645 E. 79th street, on the evening of August 29, 1927." You state the matter has been brought to the attention of the City Prosecutor for action, but you ask that, "aside from this fact," we "advise as to what power the Fire Commissioner has under the City ordinances in cases where the fire prevention ordinances are violated by theater owners and managers." This matter is covered mainly by the ordinance on "Fire Prevention," chapter XXXI of the Municipal Code of 1922, page 370. Subdivision (c) of section 1276 provides as follows:

"It shall be the duty of the chief of fire prevention and public safety when any citizen represents that any of the several provisions of this chapter are being violated, * * * that doors, stairways, corridors, exits or fire escapes, in any factory, workshop, place of employment, amusement, education or recreation are obstructed or are in bad order or repair, or that any door or exit is kept locked or fastened during the time such places are occupied or crowded beyond the capacity of its exits, * * * or that any building structure or place in the City is being maintained in such a manner as to be a fire menace or dangerous in case of fire, panic or accident, to make an examination of such building, structure or place, and if such representation is found to be true, he shall give notice in writing as provided in the preceding paragraph. And in case the charges, alterations, repairs or requirements ordered in such notice are not made within the time therein specified, he shall make returns of such violations of the several provisions of this chapter, or of any default of such notice, to the department of law of the City of Chicago, for prosecution."

By section 1277 the chief is empowered "to pass upon any questions arising under the provisions of this chapter; and section 1278 charges him with the duty "to enforce all the provisions of the chapter which may tend to prevent the starting and spreading of fires or disastrous

results in case of fire, and to order the discontinuance of any practice which may result in the starting or spreading of fire.”

The duty involved in the particular case of theaters or their managers, violating the ordinances or laws against crowding the aisles, entrances and exits of the theaters, is primarily that of the department of police at the time of such actual violations, and not that of the fire officers, as shown by the provisions of section 1279, which is as follows:

“Whenever it shall be necessary, in the opinion of the chief of fire prevention and public safety (or his subordinates), to call upon the department of police for aid or assistance in carrying out or enforcing any of the provisions of this chapter, he shall have the authority so to do, and it shall be the duty of the superintendent of police or of any member of the police force, when called upon by said chief or his duly authorized agent, to act according to the instructions of and to perform such duties as may be required by him, in order to enforce or put into effect the provisions of the chapter.”

Answering more specifically your query “as to just what power the Fire Commissioner has under the City Ordinances” in such cases as this, where a violation of any of the ordinance provisions is in progress, it is to call the police who may make arrests without warrant, as in the case of law violation committed in the officer’s presence. Such officers may, in addition to arresting the theater manager and his subordinates who are operating the theater at the time of such violation, clear the aisles and places of exit by ejecting all persons therein from the theater and may station themselves in the entrances and refuse admission to any persons who may be in excess of the capacity attendance permitted by the ordinance at the time.

This process of enforcing the law and ordinances may be continued with every successive violation and if violations are persisted in, the theater may be proceeded against as a public nuisance.

These are broad powers which seem to be sufficient to enable the Fire Commissioner and his department to cope with the situation herein presented and complained of by the battalion chief. The battalion chief's implied criticism of the courts and prosecuting officers, cannot, of course, with any propriety be considered here. If it be deemed necessary to secure additional authority and power in the situation, the Fire Commissioner may make appeal to the City Council for greater and more specific cooperation of the police department with the fire department. The Council is granted the express power by clause 71 of section 1, Article V, of the Cities and Villages Act "to provide by ordinance in regard to the relation between all the officers and employees of the corporation in respect to each other, the corporation and the people." Smith-Hurd's Stat., 1923, p. 224.

(No. 6106—October 13, 1927—G. F. M.)

PENSIONS, PERSON MARRYING ANNUITANT.

A woman is not entitled to an annuity as the widow of a deceased municipal pensioner unless she was married to him while he was in the service of the City and before he attained age 65.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the pension rights of a widow married subsequent to grant of pension to her husband, the following is submitted:

Your letter states that William J. Doherty was granted annuity on May 1, 1922, on which date he resigned from the City service; that he was at that time married to Elizabeth K. Doherty; that Elizabeth K. Doherty died November 6, 1922; that William J. Doherty married Hannah McG. Doherty at Louisville, Kentucky, April 23, 1924, and that he was then under sixty-five (65) years of age; that Mrs. Hannah Doherty has applied for an annuity as his widow.

Section 38 of the Municipal Employees' Annuity and Benefit Fund Act, among other things, provides as follows:

"The following described wives or widows of Municipal Employees shall not have any right to annuity from the fund herein provided for:

(b) The wife or widow married subsequent to the date upon which this Act shall come in force and effect in such City, of any Municipal Employee who shall have resigned or been discharged from the service and who shall or shall not have entered upon annuity, and who shall die while out of the service, if such widow shall not have been the wife of such Municipal Employee while he was in the service and before he attained the age of 65 years."

Under the above quoted provision of the Act, a wife or widow married subsequent to January 1, 1922, to become entitled to an annuity must have been the wife of the beneficiary of the fund while he was in the service and before he attained the age of 65 years. If the marriage occurred while he was in the service, but after he was 65 years of age his widow is not entitled to a pension. If the widow was not his wife while he was in the service, she is not entitled to an annuity, irrespective of his age at the time of their marriage. In other words, both conditions must exist to entitle a widow to a pension,

namely: Her husband must be in the service and under 65 years of age at the time of their marriage.

Upon the information given to me I am of the opinion that Hannah McG. Doherty is not entitled to an annuity or pension as the widow of William J. Doherty.

(No. 6107—October 13, 1927—L. H.)

1 TRACTION FUND, LOANING.

The Traction Fund is a trust fund entirely distinct and separate from the Statute relating to surplus funds, and under proper ordinance may be used to make loans if secured by municipal bonds.

2 ORDINANCES.

The ordinance of July 25, 1927 (Council Proceedings, p. 985) does not authorize the loaning of the Traction Fund upon City bonds pledged as security.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter of recent date concerning the advancement of money to the City from the Traction Fund. In this letter you ask whether the City, under the ordinance passed on July 25, 1927 (Council Journal, p. 985), can lend the money in the Traction Fund to the various bond funds and accept the bonds as security, rather than make a direct purchase of such bonds.

The ordinance you speak of authorizes and directs the Comptroller and Treasurer to use the maximum sum of \$15,000,000.00 out of the moneys in the Traction Fund for the purpose of purchasing various bonds of the City in such amounts as the Comptroller and Treasurer may deem necessary to finance the projects to be paid for from such bonds. A long list of bond issues of which purchases are to be made is set forth, and it is provided that "such purchases shall be made in accordance with the provisions

of an Act of the General Assembly entitled 'An Act concerning municipal funds,' approved June 5, 1911, in force July 1, 1911, as amended."

This ordinance is in the usual form that has been in vogue for about twelve years. It was approved as to form by the Corporation Counsel before it was presented to the City Council. No question as to its validity or the authority to make purchases of bonds in pursuance thereof has arisen, and nothing in your letter or in the conversations the writer had with the representative from your office and the representative from the Treasurer's office indicates that you have any doubt in your mind as to your right to proceed thereunder. The question that you ask relates to a proposal to do something which admittedly was not contemplated by the ordinance but which the two parties just mentioned seemed to think was a desirable thing to do.

In an informal discussion which these parties had with the writer it was stated that there was a strong likelihood that the bonds of the City would bring a premium when sold on the open market; that inasmuch as the Act of the General Assembly required that all moneys realized from such sale should be credited to the special fund from which the purchases had been made (in this instance the Traction Fund), the bond funds in case of such sale to the public would be deprived of money which otherwise would belong to them while the Traction Fund would be correspondingly enriched; that this result would not be fair to the bond funds and might raise a legal question as to whether the proceeds of the bonds were being used for the purposes that the voters had authorized; and that it would be better, if it could be done, to borrow from the Traction Fund and pledge the bonds as security for the loan instead of making purchases of the bonds, so that only the prin-

cipal of the loan and interest thereon need be paid into the Traction Fund, while the premium would go to the bond fund.

Thereupon the writer was asked whether such loans (instead of purchases) could be made, and whether the ordinance of July 25th, as it stood, permitted it to be done without further action on the part of the City Council. The writer stated that it was possible to make loans from the Traction Fund or from any other fund which the City held as a trust fund, but that such loans would have to be made under the law relating generally to trust funds and they would be entirely independent of the specific statute mentioned in the ordinance of July 25th; also that, since the ordinance of July 25th expressly required that the purchases therein authorized were to be made pursuant to the statute concerning the use of surplus funds not immediately necessary for the purpose for which they are set aside, it would require the passage of a new ordinance if a different procedure were to be followed.

While the questions were thus completely disposed of in an informal way, the matter was considered of sufficient importance to place before the Corporation Counsel with a request for an opinion in which you said:

“Under the terms of an ordinance passed July 25, 1927, Counsel Proceedings, page 985, the City Comptroller and City Treasurer are authorized and directed to advance moneys from the Traction Fund, so that the City can proceed with the work of carrying out sundry improvements approved by the voters.

“The question arises as to whether the City can make a loan, pledging the bonds as security, rather than make a direct purchase of the bonds, the Traction Fund being reimbursed for such amount as was advanced.”

We understand your letter to contain two questions, first, whether a loan can be made from the Traction Fund,

and second, whether the ordinance of July 25th gives sufficient authority to do it.

With respect to the question whether a loan can be made from the Traction Fund, the Law Department has repeatedly held, both before and since the enactment of the statute permitting the use of surplus funds for purchases of the City's bonds, that the Traction Fund stands on a different footing from funds created by statutory enactment—that it is a trust fund which the City is bound to conserve and which it has the power to lend out for the purpose of securing such return of interest thereon as is reasonably consistent with the safety of the principal (see Opinions of the Corporation Counsel, 1913-14, p. 270; 1914-15, *id.*, p. 26; 1916-19, *id.*, p. 667). But it should always be borne in mind that if the Traction Fund (or any other similar trust fund in the possession of the City) is to be used for the purpose of making loans on bonds as security, such transaction is entirely distinct and independent from any authority granted under the statute relating to the use of surplus funds. Our answer to your first question, therefore, is that in case the City Council passes the proper kind of ordinance the Traction Fund may be used for the purpose of making loans therefrom upon City bonds pledged as security.

As to the second question, whether the ordinance of July 25th gives authority to make such a loan, we have already indicated that no such authority is given thereby. Under the power granted by that ordinance such a procedure would be contrary both to the ordinance and to the statute in accordance with which it was passed.

The statute relating to the use of surplus funds entitled "An Act concerning municipal funds," approved June 5, 1911, as amended, appears as paragraphs 1001-2 of chapter 24 in Cahill's Statutes of 1927, pp. 522-3. This statute authorizes the use of funds set aside for some particular

purpose not immediately necessary for such purpose for the purchase of tax anticipation warrants and for the purchase of bonds of the City which represent an obligation and pledge the credit of the City. The statute also authorizes the making of an advancement or loan from such funds in the case of a local improvement where the money is to be used for the payment of judgments of condemnation when the entire special assessment for such improvement is pledged as security. This statute does not, however, authorize the making of a loan on bonds of the City pledged as security, and therefore, if you proceed under the statute, as the ordinance of July 25th requires you to do, such a plan as you suggest would be contrary to both the ordinance and the statute.

(No. 6108—October 17, 1927—March 7, 1928—J. G. D.)

- 1 CALUMET HARBOR, CONTRACTS WITH N. Y., C. & ST. L. RY. CO. OF 1925.

The proposed agreements relating to Calumet Harbor between the City of Chicago, and the New York, Chicago & St. Louis Railway Co. executed by Mayor Dever and Al. F. Gorman, City Clerk, in pursuance of Ordinance of July 22, 1921 are void because of the repeal of the ordinance and other fatal irregularities and should not be delivered to the Railway Company unless delivery is ordered judicially.

- 2 CALUMET HARBOR, CONTRACTS, APPROVED.

Contracts between the City of Chicago and other parties relating to Calumet Harbor are invalid unless approved by the Department of Purchases and Construction of the State of Illinois.

- 3 ORDINANCES, REPEAL.

The Ordinance of July 22, 1921, which was based upon the "State Grant Act of 1921" (Laws 1921, p. 184) has been in effect repealed by the Act of July 8, 1927. Cahill's Statute 1927, p. 558, pars. 1185-1193.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Yours of October 13th, relative to the above subject matter with enclosures has been handed to me for consideration.

The proposed agreements appear to have been approved by Francis X. Busch, Corporation Counsel, approved as to form by James G. Skinner, Assistant Corporation Counsel, and executed on the part of the City of Chicago and the New York, Chicago & St. Louis Railway Company on the 12th day of August, A. D. 1925. On behalf of the City, the contract was executed by William E. Dever, Mayor, and Al F. Gorman, City Clerk. On behalf of the Railway Company, the contract was executed by J. J. Bernet, President, and Geo. S. Ross, Secretary.

The document purports to have been authorized by an ordinance of the City of Chicago, dated July 22, 1921, passed by virtue of power granted to the City in what is known as the State Grant Act of 1921. This Act will be found in Session Laws of Illinois, 1921, pages 184 to 187 inclusive, and was approved by the Governor June 24, 1921. Section 6 of the Act, page 186, is as follows:

“The City of Chicago may use for any of the purposes authorized by the Harbor Act of 1913, may sell and convey and may lease for any term of years, any part or parts or all of the lands granted to said city by this Act. Before any such sale or lease shall become effective, such sale or lease shall be approved in writing by the Director of Public Works and Buildings of the State of Illinois and, in case of approval, there shall be affixed to the instrument by which such sale or lease is effective, the seal of the Department of Public Works and Buildings of the State of Illinois.”

You will note from this section of the statute that before any sale or lease shall become effective, the same shall be approved in writing by the Director of Public Works and Buildings of the State of Illinois, and that there should be affixed to the instrument by which such sale or lease is effective the seal of the Department of Public Works and Buildings of the State of Illinois.

The proposed contract bears no such approval on the part of the Department of Public Works and Buildings of the State.

The Legislature by an Act approved June 2, 1925, Session Laws 1925, pages 585 to 600, among other things created the Department of Purchases and Construction. Section 50a, pages 597 and 598, conferred upon the Department of Purchases and Construction power:

"14. To exercise the rights, powers and duties heretofore vested by law in the Department of Public Works and Buildings by: * * *

(g) 'An Act in relation to the construction of a deep water harbor in Lake Calumet in the City of Chicago and granting lands of the State,' approved June 24, 1921."

So that on and after July 1, 1925, the approval of this contract on the part of the State devolved upon the Department of Purchases and Construction. The attached letter dated September 13, 1926, from Wm. F. Mulvihill, Superintendent of Waterways of the Department of Purchases and Construction, addressed to Hon. A. A. Sprague, then Commissioner of Public Works of the City of Chicago, among other things states:

"The Statute of 1921 under which title to the bed of the lake was transferred by the State to the City of Chicago provided for approval by this Department of any transfer of title from the City.

"In my communication I expressed the belief that the proposed agreement was not well calculated to provide a proper harbor, that it was of doubtful validity and that the proposed transfer of title to the railroad should not be approved by the Director of the Department, and I was obliged to advise him accordingly for the reasons submitted for your consideration at that time. My letter also stated that should you care to discuss the matter further, or to have the original agreements returned, and would so advise me, I

should arrange accordingly. Since that time no modification of said ordinance and agreement has been proposed by the City and none of the several objections contained in my communication above referred to have been met."

I communicated with Mr. Mulvihill by 'phone on Friday of last week and he advised me that the Department of Purchases and Construction had not up to the present time approved this proposed contract on behalf of the State.

You will note that section 6, first above mentioned, an Act of June 24, 1921, authorized the City to "sell or convey" the lands therein referred to.

In Session Laws of 1927, there appears an Act approved July 8, 1927, headed Harbor Structures Facilities, etc. Session Laws of 1927, pages 243 to 245, inclusive. Section 3 of the Act of July 8, 1927, specifically repeals the aforesaid Act of June 24, 1921. Section 3 of the Act of July 8, 1927, Session Laws of 1927, page 244, does not give the City the power to sell any of the land, but does give the City power to lease the same for a period of not longer than fifty years, on such terms and conditions as shall be prescribed by the City.

Section 3a of this Act on page 245, among other things provides:

"Before any such lease shall become effective, it shall be approved in writing by the Director of Purchases and Construction of the State of Illinois and, in case of approval, there shall be affixed to the instrument, by which such lease is effective, the seal of the Department of Purchases and Construction of the State of Illinois."

You will, therefore, observe that the law giving the City authority to pass the ordinance referred to in the proposed contract has been repealed and that the new Act in rela-

tion to the same subject has been in force since July 1, 1927. The Act of 1921, and the ordinance referred to no longer have any force or effect, so that whatever is done in relation to the subject matter of this contract must be done by an ordinance in harmony with the Act of July 8, 1927, and under that law before any lease shall become effective pursuant to any ordinance, such lease must be approved in writing by the Director of Purchases and Construction of the State of Illinois, and in the case of such approval there should be affixed to the instrument by which lease is effective "the seal of the Department of Purchases and Construction of the State of Illinois."

I call your attention to paragraphs 2 and 3, article 10 of the proposed contract, which is as follows:

"(2) The conveyance of the railroad right of way and additional lands for railroad purposes as described and set forth in Article 1 of this agreement shall be effective immediately upon the execution and delivery of this agreement, the approval of such sale by the Director of Public Works and Buildings of the State of Illinois and the affixing to the instrument by which such sale is effective of the seal of the Department of Public Works and Buildings of said State of Illinois.

"(3) The conveyance to the Company of the Harbor Lands described in Article 2 of this agreement shall be effective immediately upon the execution and delivery of this agreement, approval of such sale by the Director of Public Works and Buildings of said State of Illinois, and the affixing to the instrument by which such sale is effected of the seal of the Department of Public Works and Buildings of the State of Illinois."

It is manifest, therefore, that this proposed contract so far as it has been executed has not been approved by the State and, therefore, cannot be binding upon the City of Chicago or the New York, Chicago and St. Louis Railway Company and should not be delivered by the City of Chi-

cago to any person or corporation. As a contract it is utterly void and if delivered, may be the means of giving the City some annoyance in regard to the subject matter thereof.

You will further note that by the last paragraph of section 3, article 10, above mentioned, that when the contract has been fully executed and approved by the State of Illinois, the same should be delivered to the Chicago Title and Trust Company to be held in escrow, etc.

My recommendation is that this proposed contract be held in the custody of the City of Chicago, treated as a nullity and delivery to any person or corporation refused unless the City is required to do so by some appropriate judicial proceedings.

(Supplemental Opinion.)

Messrs. Glennon, Cary, Walker & Murray, La Salle Station, Chicago, Illinois:

Replying to your letter of recent date relative to the Calumet Harbor matter, your File No. 8.1059, I wish to advise you that my letter of October 17, 1927, to Hon. Richard W. Wolfe, Commissioner of Public Works, a copy of which I understand you have in your file, in my judgment, fully answers your inquiry as to why the City of Chicago should not deliver to the New York, Chicago and St. Louis Railroad Company the proposed contract under consideration.

Section 6 of the Act of June 24, 1921, Session Laws of Illinois, 1921, page 106, among other things, provided in substance that such contract would not become effective

until approved in writing by the Director of Public Works and Buildings of the State of Illinois.

The Legislature by an Act approved June 2, 1925, Session Laws 1925, pages 585 to 600, created the Department of Purchases and Construction. Section 50a, pages 597 and 598, conferred upon this department purchase and construction power.

“14—(Act of June 2, 1925). ‘To exercise the rights, powers and duties heretofore vested by law in the Department of Public Works and Buildings by:
* * *’ (g) ‘An Act in relation to the construction of a deep water harbor in Lake Calumet in the City of Chicago and granting lands of the State,’ approved June 24, 1921.”

Neither the Department of Public Works and Buildings of the State of Illinois nor the Department of Purchases and Construction has ever approved this contract.

On September 13, 1926, the Department of Purchases and Construction of Illinois addressed a communication to the Commissioner of Public Works of the City of Chicago, refusing to approve this contract. Session Laws of 1927, pages 243 to 245 inclusive. Act of July 8, 1927, specifically repeals the former acts.

I call your particular attention to section 3, article 10 of the contract in question, in which it is provided in substance, that when the contract has been fully executed and approved by the State of Illinois, the same should be delivered to the Chicago Title and Trust Company.

In the light of the statutes above referred to and the provisions of the contract, I, on October 17, 1927, recommended to the Commissioner of Public Works that the contract be held in custody by the City of Chicago, and be treated as a nullity and that the City should not deliver the contract to any person or corporation until compelled to do so by appropriate judicial proceedings.

(No. 6109—October 21, 1927—L. H. et al.)

1 SAFETY ISLANDS AND TRAFFIC SIGNALS, AS LOCAL IMPROVEMENTS.

The establishment of safety islands and the installation of traffic signals in connection with street widening, street openings and street paving comes within the meaning of a "local improvement" under the Illinois Constitution and Local Improvement Statute and is within the discretionary power of the local corporate authorities to order.

2 WORDS AND PHRASES.

The term "local improvement" means a public improvement which by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits attributable to the public at large.

Hon. Thomas J. Bowler, Chairman, Committee on Traffic Regulation and Public Safety:

In your letter of the 11th instant you say: "The Committee requests an opinion as to whether or not it is legally possible for the Board of Local Improvements, in connection with street widenings, street openings and street paving, to install, as a part of the expense of such improvements, safety islands and 'stop and go' traffic signals wherever in the judgment of the board such installations are necessary for the protection of life and limb on and the facilitation of traffic over such streets."

We take it that you want information as to whether these safety islands and traffic signals constitute such a local improvement, under our Constitution, that an assessment will lie against property benefited by the street improvement, or whether it will be necessary to differentiate and distinguish this part of the improvement from the rest as something beyond the jurisdiction of the Board of Local Improvements.

The Constitution authorizes the General Assembly to vest the corporate authorities of cities with power "to make

local improvements by special assessment, or by special taxation of contiguous property, or otherwise." (Art. IX, Sec. 9.) Under this authority the Legislature passed the Local Improvement Act, by which the Board of Local Improvements is given the authority to originate the improvement and to submit an ordinance therefor to the City Council. When this ordinance is passed the property affected may be assessed or taxed to the extent that it is benefited.

The term "local improvement," within the meaning of the Constitution and statute has been held to be a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. The corporate authorities are clothed with a large discretion as to the manner in which a local improvement shall be constructed. Our Supreme Court has gone on record many times to the effect that such discretion, when honestly exercised, is not subject to review by the courts.

"This court has uniformly announced and recognized the rule that in the passage of ordinances providing for local improvements the city council is clothed with power to determine what local improvement is required, its nature and character, when it shall be made and the manner of its construction. These are matters confided to the discretion of the city council, and that discretion, when honestly and reasonably exercised, cannot be reviewed in the courts." *Ton v. City of Chicago*, 216 Ill. 331; *People v. Omen*, 290 Ill. 59.

From these general expressions of our courts we construe the law on the subject to be that where the local corporate authorities have provided for a feature of an improvement that conforms to the general plan, adds to the usefulness and tends towards the fulfillment of the purpose

of the improvement, it is a part of the local improvement and within the discretion that the courts have held must not be reviewed by them. This view has been upheld even in cases where the courts have held the particular improvement under consideration as one that is not to be classed as a local improvement. Thus, in *City of Waukegan v. De Wolf*, 258 Ill. 374, where it was held that a viaduct over a ravine for the purpose of restoring the continuity of a street was not a local improvement, the court makes use of this language:

“Substantially every improvement is of some benefit to all the property of a municipality. Laying water mains for local use and affording protection against fire is a local improvement, (*Hughes v. City of Moline*, 163 Ill. 535; *Hewes v. Glos*, 170 *id.* 436); the primary purpose being to furnish water to the owners of adjoining property and to afford protection against fire to the different localities where the mains are laid, and yet such an improvement is an incidental benefit to the whole municipality by preventing the destruction of valuable taxable property, improving general conditions and perhaps preventing a general conflagration. * * * These and other cases demonstrate that the question whether an improvement is a local one, within the meaning of the constitution and statute, does not depend upon the fact that there are incidental or indirect public benefits for which an equitable portion of the cost may be assessed to the municipality, as contemplated by the statute, and is not determined by the fact that some property in the municipality is benefited to a greater degree than other property, but does depend upon the nature of the improvement and whether the substantial benefits to be derived are local or general in their nature. If its purpose and effect are to improve a locality it is a local improvement although there is incidental benefit to the public, but if the primary purpose and effect are to benefit the public it is not a local improvement although it may incidentally benefit property in a particular locality.”

In a case involving the widening of Roosevelt Road (*City of Chicago v. Lord*, 277 Ill. 397), our Supreme Court decided that street widening projects such as those you have under consideration are local improvements, even though they are part of a general plan for improving the City, and even though the commissioners, in spreading the assessment in that case, assessed one-half of the entire improvement against the City for public benefits. This being so, it would seem to follow that if the purpose of the improvement is better served by the establishment of safety islands and the installation of traffic signal lights, the inclusion of same in the improvement is within the discretion of the local corporate authorities.

We have been unable to find a precedent that is absolutely in point that we can refer you to in determining the question you ask us; and there is some apparent conflict of authority in regard to features of individual improvements. We are therefore unable to say that the conclusion we have reached is beyond all doubt. But we think that a reasonable application of the general principles that we have pointed out must lead to that conclusion.

We are therefore of the opinion that the Board of Local Improvements may include safety islands and traffic signal lights in its plans for street improvements and cause assessments to be levied for them. The consideration to be given to these in determining what proportion of the cost is to be borne by the general public is a matter that will arise in each case when the assessment is about to be levied.

(No. 6110 November 1, 1927—G. F. M.)

1 PENSIONS, REFUND, ADOPTED CHILD.

An adopted child is an heir at law within the meaning of section 29 of the Municipal Employees' Benefit Act and is entitled to the payment of a refund.

2 MUNICIPAL EMPLOYEES' BENEFIT ACT.

Section 39 permits payment of refund to an adopted child.

Retirement Board, Municipal Employees Annuity & Benefit Fund:

Replying to your request for an opinion as to the right of an adopted child to take as an heir of a deceased employee, the following is submitted:

Your letter states that Miss Edith Horstmann, legally adopted daughter of Henry C. Horstmann, deceased, has filed an application for a refund of the amount to his credit, he having died on October 13, 1927; that Mr. Frank Derby, attorney representing Miss Horstmann has filed in your office, a certified copy of the Table of Heirship showing Edith Horstmann, legally adopted daughter, as his only heir at law and next of kin, also a certified copy of a decree of divorce issued to Mrs. Harriet M. Horstmann on June 27, 1926, by Judge Harry A. Lewis of the Superior Court of Cook County, and a certified copy of the adoption papers issued by the County Court of Cook County.

Section 5 of chapter 4 Smith-Hurd's Statutes of 1927, page 97, provides that an adopted child shall be deemed, for the purposes of inheritance by such child, the child of the parents by adoption, the same as if he or she had been born to such parents in lawful wedlock, except that he or she shall not be capable of taking property expressly limited to the body or bodies of parents by adoption or property from the lineal or collateral kindred of such parents by right of representation.

Section 39 of the Municipal Employees Annuity and Benefit Fund Act provides that in certain events the refund shall be paid to the heirs of the municipal employee according to the law pertaining to estates of deceased persons. As the Annuity and Benefit Fund Act does not limit the payment of refund to "heirs of the body" such refund must necessarily be paid to the legal heirs as fixed by statute.

Under the facts presented to me, I am of the opinion, that Miss Edith Horstmann is entitled to be paid the refund of Henry C. Horstmann as his only heir at law and next of kin, in accordance with the Table of Heirship filed in his estate.

(No. 6111 November 1, 1927—G. F. M.)

1 WORKMEN'S COMPENSATION, MUNICIPAL EMPLOYEES.

A municipal employee who is injured while going to or returning from his or her place of employment is not entitled to duty disability benefits but may become entitled to ordinary disability benefits.

2 MUNICIPAL EMPLOYEES, ORDINARY DISABILITY BENEFIT.

A municipal employee who is entitled to ordinary disability benefits which are less in amount than an award made under the Workmen's Compensation Act for the same injury is not entitled to receive or be paid such disability benefits.

3 MUNICIPAL EMPLOYEES, DISABILITY BENEFITS, REFUNDING.

A municipal employee who has collected ordinary disability benefits and afterwards secures an award under the Workmen's Compensation Act greater in amount than such benefits must repay to the Municipal Employees' Annuity and Benefit Fund the disability so collected and paid.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of your Honorable Body to reimbursement where work-

men's compensation has been paid to a disability beneficiary, the following is submitted:

Your letter states that Mrs. Mamie Kallish, junior clerk on P. R. 3610, Department of Gas and Electricity, was injured on May 22, 1927, while on her way to her office on the sixth floor of the City Hall by slipping on the said floor near the drinking fountain; that she filed an application for duty disability benefits which came before your Honorable Body at meeting No. 77 held August 19, 1927; that her claim for duty disability was disallowed but she was allowed ordinary disability benefits to begin June 23, 1927, at the rate of \$2.64 per day; that she was paid a total of \$262.02 for such benefits; that she returned to work on October 1, 1927, and the ordinary disability benefits were discontinued after September 30, 1927; that she applied for workmen's compensation at the City Attorney's office and was granted compensation at the rate of \$14.00 per week or a total of \$268.00.

Ordinary disability benefit is allowed under section 47 of the Municipal Employees' Annuity and Benefit Fund Act, for disability arising from a cause other than injury incurred in the performance of an act or acts of duty. Section 48 of the Act provides that if any municipal employee who shall be disabled shall receive any compensation from the City on account of such disability under and by virtue of the law known as the Workmen's Compensation Act, the disability benefit provided for such municipal employee shall be reduced by any amount so received, if such amount shall be less than the amount of such benefit; and if the amount or amounts received as compensation exceed the amount of the disability benefit, such municipal employee shall not receive any such disability benefit until a period of time during which such benefit would equal the amount of such compensation shall have expired, without interest being calculated upon either of such amounts.

Under the facts stated and under the provisions of the Municipal Employees' Annuity and Benefit Fund Act, I am of the opinion that Mrs. Kallish was not entitled to receive any ordinary disability benefits, as the total amount of such benefits was less than the total amount of compensation paid to her. Mrs. Kallish should be requested to repay into your fund the amount of \$262.02 so paid to her in error.

(No. 6112 November 2, 1927—L. H.)

1 CONTRACTS, ADVERTISEMENT FOR BIDS, NECESSITY.

The City Council by a two-thirds vote of all the elected aldermen may dispense with the necessity of advertising for bids as a pre-requisite to the making of a contract for work other than a local improvement.

2 CONTRACTS, VALIDITY.

A contract without some basis for estimating its cost is of doubtful validity.

Hon. Albert W. Goodrich, Fire Commissioner:

In your letter of recent date, addressed to the Corporation Counsel, you call attention to the ordinance passed on August 31, 1927 (Council Journal p. 1067), whereby the City directed the sale of the property used by the Fire Department at 326-328 South Jefferson street and authorized the purchase of the property at 324-326 South Desplaines street. You state that this deal is between the City and the James T. Igoe Company, and that Mr. Igoe has agreed to construct a house in accordance with your plans and specifications on the lot thus to be purchased and to turn over the completed building at the actual cost of construction. You wish to be advised whether the City can legally purchase the building upon its completion, and if so, then you request us to prepare the necessary Council order to accomplish this result.

It is within the power of the City Council, by a two-thirds vote, to let a contract for a public improvement without advertising. The only question in this case is as to what will be the proper method to pursue. The authority to let the contract without advertising is found in section 50, of article IX, of the Cities and Villages Act, which reads in part as follows:

“Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance: *Provided*, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected; * * *.” Cahill’s Stat., 1927, p. 323.

In order to make a contract with Mr. Igoe at the present moment, it would be necessary to leave the amount of the compensation to be paid undetermined. Aside from any question of policy with respect to such a course, there is some doubt as to whether a contract without some basis for estimating the cost would stand the test of validity. Therefore, the passage of an order at this time would be premature.

This does not present a real difficulty, however, because, you say, Mr. Igoe has agreed to submit all proposals received by him for the construction of the building to your department before awarding the contract. When he does this the Council order can be passed by a two-thirds vote with the cost of the improvement stated therein.

We have prepared, and submit herewith, draft of an order containing a blank space for the amount of the contract, which may be filled in and presented to the City Council for its consideration when the proper time comes.

(No. 6113—November 2, 1927—F. J. C.)

1 ZONING, LAUNDRIES, CLASSIFICATION.

Since July 25, 1927, laundries operated by any machinery are not in class "C1" but in class "M1" under section 11 of the Zoning Ordinance as amended.

2 WORDS AND PHRASES.

The term "machinery" used in the Zoning Ordinance as amended, in the absence of specific definition, must be given such a construction as would effectively carry out the spirit of the Zoning laws under the particular circumstances of each case.

Hon. Christian P. Paschen, Commissioner of Buildings:

Your letter of October 28th to this office requesting an opinion regarding the interpretation of the amendments to the Zoning Ordinance as it affects laundries run by machinery or in which machinery is used has been received.

We have examined the Zoning Ordinance and the sections thereof referred to in your letter. From such examination we find the part of the Zoning Ordinance which has application to laundries has been amended as you suggest in your letter. The original section of the Ordinance classified and included laundries under the classification of "C1," as follows:

"Restaurant, laundry, theatre, dance hall, billiard room or bowling alley, if such restaurant, laundry, theatre, dance hall, billiard room or bowling alley is operated as a business for purposes of private profit;
* * *,"

The amendment adopted July 25, 1927, and appearing on page 913 of the Journal of Proceedings reads thus:

"Restaurant, laundry—except a laundry in which machinery is used, theatre, dance hall, billiard room or bowling alley, if such restaurant, laundry, theatre, dance hall, billiard room or bowling alley is operated as a business for purposes of private profit."

It will be seen that a strict interpretation of this part of the ordinance before it was amended would mean that any laundry could be used or operated in a district zoned under Class C1, but in the amendment it will be seen that an exception is made taking laundries in which machinery is used out of this classification.

In the original Ordinance under section 11 having reference to manufacturing districts, the following language was used:

“An M1 use, provided such use does not customarily omit dust, gas, smoke, noise, fumes, odors, or vibrations which may be offensive or noxious to the adjacent R or A or C uses and does not injure the operation of adjacent C or M uses, shall include also every such use as

Bleaching and dyeing of yarns, textiles, or felt in case sulphur colors or materials which create offensive odors are not used; * * *.”

And in the amendment of July 25, 1927, at page 913, the following language was used:

“Steam laundry, wet wash laundry, or other laundry in which machinery is used; bleaching and dyeing of yarns, textiles, or felt in case sulphur colors or materials which create offensive odors are not used.”

It will be seen that by this amendment there was added to the provisions of the ordinance relating to an M1 use the additional use of a steam laundry, wet wash laundry or other laundry in which machinery is used.

We note in your letter that your difficulty lies in differentiating between a laundry run by machinery or in which machinery is used and the term laundry, and in your letter you state that your attention has been called to the amendments of the Zoning Ordinance which we have above referred to and to which you specifically refer in your letter.

You request that we advise you whether a laundry in which is operated a minimum amount of hand or motor driven laundry machinery should be classified as a C1 use and if so, where the line of demarkation is to be drawn that would take it out of the C1 classification and include it in the M1 classification.

Your question and your request present difficulties which have not only been encountered by you but which have been encountered by the courts in the various jurisdictions. A strict interpretation of these particular sections and a technical application of the rules laid down in the decisions and in the books would seem to indicate that under the classification of a C1 use no laundry with any machinery could be operated within a district zoned for that use. This difficulty is made more manifest by the use of the word machinery in the Ordinance.

We have examined the authorities as to the definition of the word machinery and we find that the courts have defined this word in the case of *Green v. American Car and Foundry Company*, reported in the 71st Northeastern Reporter, at page 268, where the court at page 270 said (quoting from the case of *Corning v. Borden*, 15 How. 252, 14 L. ed. 683, a Federal Supreme Court case):

“The term ‘machine’ includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result.”

In 38 Corpus Juris, page 330, machinery is defined as:

“‘Machinery’ is a word of common and everyday use. Primarily, it may be defined as the works of a machine; the means and appliances by which anything is kept in action; the mechanism or works of a machine or machines; the working parts of a machine, engine, or instrument. Then it may also be defined as the parts of a machine considered collectively; the combination of the several parts to put it in motion;

any complex system of means and appliances. In its broader sense the means and appliance by which anything is kept in action or a desired result is obtained; a complete system of parts adapted to a purpose; the combination of mechanical means to a given end; any mechanical device to carry on any particular work, or keep anything in action, or to effect a specific purpose or end, as the machinery of government. Considering the end or effect of the combined means or appliance, in a technical sense machinery may be defined as the working parts of a machine, engine or instrument, arranged and constructed so as to apply and regulate force; a mechanical combination of parts for creating or for applying power in engines or machines; any combination of mechanical means designed to work together so as to effect a given end, as the machinery of a watch, a canal lock; any construction of mechanical means designed to work together so as to effect a given end; an artificial work which serves to apply or regulate moving power or to produce motion.

“ ‘Machinery’ is not synonymous with ‘machine.’ The word ‘machinery’ is of a much broader application and much more comprehensive and extensive in its signification or meaning than ‘machine,’ ‘machinery’ including appurtenances necessary to the working of a machine.”

In the foot-notes on the same page in *Corpus Juris* there is quoted from the case of *National Enameling, etc. Co. v. Zirkovics*, 251 Fed. 184, the following language:

“A machine is a concrete thing, consisting of all the parts and devices necessary to its operation. On the other hand, machinery is only a part of a machine, designed to work with other parts, so as to effect the common end; * * *.”

And on page 331 of the same volume of *Corpus Juris* in the foot-notes in the case of *Georgia Pac. R. Co. v. Brooks*, 84 Ala. 138, the following language is quoted:

“A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when

intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification."

From these definitions it is apparent that the use of the word machinery in the Ordinance creates a difficult problem of construction to all who have to do with the enforcement or interpretation of the meaning of the Ordinance. If the meaning of the word is to be applied strictly, we might conclude that only such a laundry in which tools are used could be operated in a C1 class. Taking the decisions quoted as the definition of the word machinery as used in the ordinance we would have to arrive at the conclusion that no machinery of any character could be used in a laundry in the district zoned for C1 purposes. In the interpretation of such Ordinance, such construction should be given as would give effect to the spirit of the Zoning laws, and each particular case would have to be considered on the particular merits of that case.

It is, therefore, our opinion that the Ordinance prohibits the operation of any machinery in a laundry in a district zoned as Class C1.

(No. 6114—November 3, 1927—F. J. C.)

LOTTERIES. SELLING CAMPAIGN.

The sale of a commodity such as coffee with a certificate having a definite monetary value, the receipt of which certificate is made to depend upon lot or chance by being only one in 500, the remaining 499 certificates merely containing advertising matter, amounts to the operation of a lottery under the Illinois Statute and is unlawful.

Hon. Michael Hughes, Superintendent of Police:

We are in receipt of your communication enclosing communication from Mr. C. B. Potter of the Potter Coffee

Company, 849 Washington boulevard, in which he outlines an advertising campaign on a new brand of coffee which he desires to place on the market. In your letter you ask us to furnish an opinion regarding the matter.

It seems from Mr. Potter's communication that in placing this brand of coffee on the market he intends to use two kinds of certificates, viz.: one containing only advertising matter and the other having a value of \$5.00 in gold to the one who draws it in a package. One of the \$5.00 gold certificates will be placed in a series of 500 packages while the other 499 certificates of the series of 500 packages will only have printed thereon advertising matter. A sign advertising this scheme will be placed at the top of each display rack from which this coffee is to be sold. Mr. Potter asks you for a ruling as to whether or not this method could be used legally.

In reply, we desire to say that we have examined the statutes as to whether or not this scheme would be legal. We desire to call your attention to the fact that section 180 of the Criminal Code, chapter 38, paragraph 406, page 981, Cahill's Statutes, 1927, reads as follows:

"Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift, or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property, with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000."

This section has been construed in the case of *Almy Mfg. Co. v. City of Chicago*, 202 Ill. App. 240. While the decision is based on the question of whether or not a slot machine is a gambling device, the court in its opinion on page 246 of this volume, says:

“We think the logic and the reasoning in the case *supra* are pertinently applicable to the facts of the instant case. Lot and chance are the elements of this device, which stamp it as gambling.

“In *Horner v. United States*, 147 U. S. 449, the scheme of the Austrian government to float some bonds was declared to be a lottery, and the court said:

“Although the transaction in question was an attempt by Austria to obtain a loan of money to be put into her treasury, it is quite evident that she undertook to assist her credit by an appeal to the cupidity of those who had money. * * * Every holder of a bond has an equal chance with the holder of every other bond of drawing one of such prizes. Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an “enterprise offering prizes dependent upon lot or chance.” The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter.’”

You will note that under the wording of the statute that it is illegal “under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever” to dispose of, or offer or attempt “to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game,” etc.

In our opinion the scheme outlined in Mr. Potter’s letter makes the collection of the \$5.00 in gold contingent upon lot and by numbers and therefore this scheme comes directly within the statute as it has reference to lottery.

Under the decision above quoted you will note that the court used the language that the element of certainty

goes hand in hand with the element of lot or chance and the former does not destroy the existence or effect of the latter. This being the case, it is our opinion that such scheme as is outlined by Mr. Potter cannot be legally carried out.

(No. 6115—November 4, 1927—M. H. F.)

1 FILLING STATION, FRONTAGE CONSENT, WITHDRAWAL.

An affidavit for the withdrawal or revocation of a consent to the installation of a filling station filed 17 days after the issuance of a permit therefor, which affidavit is based upon misrepresentation in securing the consent must state facts and give names from which the misrepresentation will appear where the withdrawal would have the effect of revoking the permit on account of insufficient frontage.

2 FRONTAGE CONSENT, WITHDRAWAL.

A consent may be withdrawn by the property owner at any time before a permit has been issued, but after the issuance of permit, the consent can only be withdrawn in case same has been obtained by fraud, misrepresentation or duress.

Hon. A. W. Goodrich, Fire Commissioner:

Your communication of October 28, 1927, addressed to the Corporation Counsel relative to permit for gasoline filling station at 7900 Dorchester avenue, has been referred to the undersigned for consideration and reply.

You state that on August 23, 1927, application was made by Charles R. Trumbull to install tanks at said location; that the location conforms to the Zoning Ordinance; that frontage consents were filed with the application and verified by the Superintendent of Maps, and that official's report showed a surplus of 9.00 feet; and thereupon and thereafter on September 29, 1927, you issued a permit to install the tanks.

You further state that since the issuance of your said permit and on October 17, 1927, an affidavit was filed, a copy of which affidavit you enclosed with your communication. This copy purports to be a copy of the affidavit of Charles H. Linville sworn to October 17, 1927, in and by which affiant deposes and says that he is the Charles H. Linville whose name appears on a certain consent in the application of Charles R. Trumbull for a gasoline and oil station at the above mentioned location. It further contains the following statements:

“Affiant further says that said signature was obtained by means of misrepresentation, and that he desires to have his name withdrawn from said consent.

“Affiant further says that he was given to understand that the neighbors in the vicinity wanted said oil station, (when, as a matter of fact, said residents of the immediate locality are opposed to the same); and that several names of the people who were living in the immediate vicinity of the oil station, were shown to him as having signed said petition for the consent to have said gasoline and oil station placed on said corner.

“Affiant further says that he is opposed to the establishment of said oil station, and desires to have his name withdrawn from said consent.”

You request us to furnish you an opinion as to whether or not you have the right to revoke the permit and stop all work, especially in view of the fact that the affidavit was received after permit was issued.

It is noted that said affidavit was not sworn to or filed with you until October 17, 1927, eighteen days after the formal issuance of your permit.

We assume that the accomplished withdrawal or revocation of Linville's consent would exhaust the surplus of 9.00 feet and reduce the frontage consents below that legally required for the issuance of the permit.

The law is well settled that a property owner may withdraw or revoke his consent at any time before the issuance of the permit; but not thereafter except in cases where his consent has been procured through fraud, misrepresentation, duress or the like. This office has rendered your office numerous opinions upon this point.

Linville states in his affidavit that his signature was obtained "by means of misrepresentation." He also states that he was given to understand that the neighbors in the vicinity wanted said oil station (when as a matter of fact, said residents of the immediate locality are opposed to the same); and that several names of the people who were living in the immediate vicinity of the oil station were shown to him as having signed said petition, etc.

We do not think that this property owner has stated sufficient facts in his affidavit or made a sufficient showing of misrepresentation which would permit him to revoke his consent after the formal issuance of the permit, or which would warrant you in now revoking your said permit

Affiant does not disclose by whom he was given to understand that the neighbors in the vicinity wanted said petition or who showed to him the names of the people who were living in the immediate vicinity as having signed said petition, or that such names were in fact present or absent from the petition when presented to him. At the time he signed the petition he must have had it before him and been able to see for himself what property owners had already signed it. As it appears to us, the allegation of misrepresentation made in his affidavit amounts to little more than the statement of a conclusion, and is not adequately supported by disclosed facts.

In an opinion of this office rendered March 21, 1916 (Opinions of Corporation Counsel from May 1, 1915, to June 30, 1916, page 896), in a matter involving frontage consents supporting a building permit, it was said:

“The petitioners who have signed the frontage consent for the permit to erect the aforesaid building are not permitted to change their position to the detriment of the owner of said building, unless their signatures were secured through fraud, duress or in some other illegal manner, and this question is one for the courts to determine and beyond the jurisdiction of the building commissioner.”

Should Mr. Linville be able to bring forward further facts which strengthen his claim to misrepresentation, the courts are open to him. As the record now stands in your office, we are of opinion, as stated before, that you are not now warranted in revoking the permit.

(No. 6116—November 4, 1927)

1 WATERS, RIPARIAN RIGHTS, LAKE MICHIGAN.

The people of the states of Illinois, Indiana, Michigan and Wisconsin, as riparian owners, have the right to use the water of Lake Michigan for drinking and other domestic purposes subject only to the right of the Federal Government to regulate commerce among the several states and with foreign nations with reference to navigable waters.

2 WATERS, NAVIGABLE STREAMS, INTERFERENCE, BURDEN OF PROOF.

The burden of establishing interference with navigation by the natural use of water from navigable streams is upon the party alleging or claiming interference.

3 WATERS, SANITARY DISTRICT OF CHICAGO, FEDERAL PERMIT.

The condition in the permit of the Secretary of War to the Sanitary District of Chicago requiring the City of Chicago to meter all water used from Lake Michigan is not binding upon the City of Chicago.

Hon. William Hale Thompson, Mayor:

You have asked me for an opinion as to the right of the Department of War of the United States to impose restrictions on the use by the people of the City of Chi-

cago of water from Lake Michigan for drinking and other domestic purposes. This question is obviously prompted by the fact that in the permit issued by the Secretary of War to The Sanitary District of Chicago authorizing the withdrawal of water from Lake Michigan in excess of the amount fixed by Federal Statute, there is a condition which requires that the City of Chicago shall cause the water distributed by it to be metered.

The ownership of Lake Michigan is in the people of the States bordering on the Lake—namely, Michigan, Wisconsin, Indiana and Illinois. Such ownership implies and includes the rights that inhere in the riparian owners of land alongside a stream or other body of water. That is to say, it includes the right of the people of these States to use the water for drinking and other domestic purposes. The ownership of the Lake in the people of the surrounding States is subject only to the power of the Federal Government to regulate commerce among the several states and with foreign nations, a power which has been construed to mean that the Federal Government has control of all navigable waters only for the purpose of commerce.

This principle has been defined in the case of *Port of Seattle v. Oregon and Washington R. R. Co. et al.*, 255 U. S. 56, at page 63, where Justice Brandeis delivered the opinion of the United States Supreme Court and stated the following:

“The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same.”

The theory upon which our Federal Government is founded is that all power is vested in the people; that

the Government has no powers except such as are derived from the consent of the people and are expressly or by necessary implication given to it by the Constitution of the United States. Subject to the power to regulate commerce expressly granted to Congress by the Constitution the absolute and paramount right remains in the people of Chicago to withdraw from Lake Michigan such water as is necessary for drinking and domestic purposes, and essential to the health, well-being and life of the people. This right, founded in the necessity of life itself, is assuredly superior and paramount to any exercise of commerce power by the Government; and, in the very nature of the people's case, the burden of proof in establishing that navigation or commerce is in any manner impaired so as to warrant any interference with, or restriction upon, such use of the water by the people, should be assumed by the Government. And, only upon the most convincing facts and proof should the government ever feel justified and warranted in interfering with the right of the people of Chicago to the full enjoyment of the waters of Lake Michigan for drinking and domestic purposes.

The Supreme Court of the United States in the case of *The Sanitary District of Chicago v. United States*, 266 U. S. 405, entered a decree by which The Sanitary District of Chicago was enjoined from withdrawing more than 4,167 cubic feet of water per second from Lake Michigan. This was the amount that Congress had authorized.

The question of the right of the people of Chicago to the use and enjoyment of the waters of Lake Michigan for drinking and domestic purposes was not involved in that case. Nevertheless, the Court took cognizance of the fact that there might be danger to health if the flow of water from Lake Michigan was immediately reduced, and gave authority, in its decree, to the War Department to

permit the flow of additional water under such restrictions as that Department might fix.

In pursuance of this authority, the War Department has issued a permit authorizing an additional flow of water, but has inserted therein a condition under which it is now claimed that the City is required to meter all water used. Such a condition, inserted with the consent of the Sanitary District, cannot bind the City of Chicago. The City of Chicago is a municipal corporation separate and distinct from the Sanitary District, and was not a party to the suit. The most that the Sanitary District can do under the circumstances is to endeavor to persuade the City of Chicago to comply with a condition which the Sanitary District has accepted.

The position that the City can justly take in this matter is that the health, well-being and life of its inhabitants are of greater importance than any inconvenience or embarrassment that might be occasioned to the Sanitary District of Chicago as a corporation.

In addition to this, the expense to and burden on the people of Chicago involved in a metering program which is utterly futile should not be lost sight of. The plan proposed can accomplish no result which can not be achieved with equal celerity by the ordinance that was in force some time ago under which large buildings and industrial plants were compelled to install meters. On the other hand, the added costs to the people of Chicago under the most favorable interpretation of the condition imposed will be at least twenty million dollars, and if the condition is construed to mean that water drawn from fire hydrants and other free water must be controlled by meter, the expense may be as high as sixty million dollars.

These circumstances call for a recurrence to those fundamental principles of civil government which underlie the

fabric of our social structure, in order that the inalienable rights to life, liberty and the pursuit of happiness may not be invaded or destroyed.

My opinion is that the Federal Government cannot impose any restriction upon the use by the people of Chicago of the water of Lake Michigan for drinking and other domestic purposes.

(No. 6117—November 8, 1927—L. H.)

1 LIBRARIES, CHICAGO PUBLIC LIBRARY, PUBLICATIONS, SALE OF.

The Library Board of the Chicago Public Library has neither express nor implied power to sell pamphlets or any other publications although said Board may with the approval and consent of the City Council sell real or personal property which the Board deems unnecessary for library purposes.

2 LIBRARIES, BOARD OF DIRECTORS, POWERS.

The powers delegated to the Board of Directors of the Chicago Public Library are strictly construed.

3 MUNICIPALITIES, INCIDENTAL POWERS.

A power in a municipality will not be regarded as incidental unless it can be fairly implied or it is necessary to carry out an intended object or purpose; and the power in the Library Board of the Chicago Public Library to sell publications cannot be considered as incidental.

Hon. Samuel A. Ettelson, Corporation Counsel:

In response to your request for an opinion as to whether the Board of Directors of the Chicago Public Library have power to sell pamphlets to the public, I submit the following:

The Chicago Public Library was established and is maintained under the Act of the General Assembly approved March 7, 1872, as amended from time to time. The title of the Act since it was amended in 1921 has been

“An Act to authorize cities, villages, incorporated towns and townships to establish and maintain free public libraries and reading rooms.” Before amendment the only difference in the title was that the word “villages” did not appear in it. Under this Act the control and management of the public library and reading room is placed in a Board of Directors of nine members, who are given certain specific powers.

In the case of any board, commission or other body of officials created by statute, it can only exercise such powers as are expressly given to it “and must find in the statute its warrant for the exercise of any authority which it claims.” *People ex rel. Baird v. Stevenson*, 270 Ill. 569-571.

The powers of the Board of Directors are all contained in section 5 of the Library Act, which reads as follows:

“Said directors shall, immediately after appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading room as may be expedient, not inconsistent with this Act. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose. All moneys received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other moneys of such city, and drawn upon by the proper officers of said library, upon the properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, or to purchase, lease, erect and occupy an appropriate building or buildings for the use of said library. When a building erected or purchased by the board is not adapted to

its purposes or needs the board may remodel or reconstruct such building. Said board may also, with the approval and consent of the city council, board of trustees, or board of town auditors, as the case may be, sell or otherwise dispose of any real or personal property that it deems no longer necessary or useful for library purposes. Said board shall have the power to appoint a suitable librarian and necessary assistants and fix their compensation, and shall also have power to remove such appointees, and shall, in general, carry out the spirit and intent of this Act, in establishing and maintaining a public library and reading room."

Nowhere in the above section can be found any authority to sell books or pamphlets whether they are the Board's own publications or are published by others. The only power to sell anything is that which it can exercise only with the approval and consent of the City Council, and that relates to real or personal property that the Board "deems no longer necessary or useful for library purposes." While the powers granted in the section quoted above may be liberally construed to cover anything which is incidental to the express powers delegated, the rule is that powers will not be regarded as incidental unless they can be fairly implied or are necessary to carry out the purpose intended—not merely convenient but indispensable. *Dillon, Mun. Corp.*, 5th Ed., sec. 237.

The Legislature undoubtedly intended a strict construction of the powers it delegated to the Board of Directors. This is evidenced by the fact that even such things as might be regarded as incidental are expressly provided for. Thus, by section 6 authority is given to prescribe reasonable rules and regulations for the use of the library and reading room, to exclude persons who violate the rules, and to extend the privileges to non-residents; by section 8 the imposition of fines is permitted, but only when the City Council prescribes them by ordinance; by

section 9 the acceptance of gifts and donations is provided for. All these precise requirements and limitations indicate that the purpose of the Legislature was to define exactly what the Board of Directors can do.

In addition to this it would seem that the sale of publications is contrary to the spirit of the Act. The title indicates that the institution should be a *free* library and reading room, and section 6 provides that every library and reading room established under the Act "shall be forever free to the use of the inhabitants of the city where located." If it is insisted, in reply to this, that the library is free and that the selling of pamphlets is outside of the regular scope of a free library, then the contention answers itself because the Library Board has no right to go beyond the scope of the Act.

I submit, therefore, that the sale of the pamphlets in question is beyond the authority conferred by law on the Board of Directors of the Chicago Public Library.

(No. 6118—November 10, 1927—G. F. M.)

1 PENSIONS, STATUS OF APPLICANT.

The date of filing an application for an annuity and not the date when it has been acted upon determines the status of the applicant as well as that of his dependents.

2 PENSIONS, WIDOW AND CHILDREN OF POLICEMAN UNDER 50 YEARS OF AGE.

A widow is entitled to an annuity under section 56 and a minor child is entitled to an annuity under section 48 of the Policemen's Benefit Act where the husband and father resigned from the force while still disabled with less than 20 years of service and died when under 50 years of age.

Retirement Board, Policemen's Annuity & Benefit Fund:

Replying to your request for an opinion as to the pension rights of a widow and minor child of a policeman

who died at the age of thirty-eight (38), after resigning from the police department and applying for annuity, the following is submitted:

Your letter states that Richard W. Kapelski was born January 29, 1889; was appointed to the police department November 11, 1914; served as policeman for a period of ten (10) years, three (3) months and seventeen (17) days, when he was placed on the ordinary disability roll; continued in receipt of ordinary disability benefit until September 28, 1927; resigned from the police department and filed application for annuity on September 26, 1927; died before application for annuity could be acted upon, to-wit October 6, 1927; is survived by his widow, Mathilda Kapelski and minor child; and that an application for annuity has been filed with your Honorable Body by the widow Mathilda Kapelski.

Section 56 of the Policemen's Annuity & Benefit Fund Act provides for a pension to be paid the widow of any "present employee," who shall resign from the service and who shall enter upon annuity, of a sum produced by multiplying the sum of \$30.00 by the number of years of service rendered by such "present employee," including the year in which said present employee shall have rendered his final service. Whenever a policeman resigns from the service and files his application with your Honorable Body for an annuity, and is entitled to such an annuity, such policeman must be deemed to have "entered upon annuity" upon the date of the filing of his application, and without regard to the date when such application is acted upon by your Honorable Body, or a payment of annuity is in fact made to him. When all conditions entitling a policeman to annuity exist and such policeman resigns from the police department, he becomes entitled to such annuity; and when he has filed an appli-

cation for the same, he has performed all of the requirements devolving upon him and any delay on the part of the Retirement Board in making payments, however unavoidable or necessary, cannot change his status nor the status of those entitled to annuities as his dependents.

Section 44 of the Policemen's Annuity & Benefit Fund Act provides for an annuity to a minor unmarried child of certain classes of policemen, but does not provide for an annuity to the minor child of a policeman who resigns from the force with less than twenty (20) years of service and while less than fifty (50) years of age. In the present case, Richard W. Kapelski had less than twenty (20) years of service in the department and was less than fifty (50) years of age.

Upon the facts as given to me, I am of the opinion that the annuity rights of the minor child in this case, however, are not governed by the limitations of section 44, but are fixed by section 48 of the Act which provides that "notwithstanding any other provisions of this Act," the child's annuity provided in section 44 of the Act shall be paid to the minor child of a policeman who, having exhausted his allowable disability benefit period, resigns while still disabled and under the age of fifty years, as in the instant case.

I am of the opinion that Mathilda Kapelski is entitled to an annuity under the provisions of section 56 of the Act and that the minor child is entitled to an annuity under the provisions of section 48 of the Act.

(No. 6119—November 15, 1927—J. G. D.)

COMMUNITY GARAGE, NO RESTRICTIONS AS TO LOCATION.

The 200 feet restriction in favor of a church, school and hospital in case of the location of a public garage does not apply to the location of a community garage.

Hon. Christian P. Paschen, Commissioner of Buildings:

Your letter of November 4th, relative to the above subject matter, addressed to the Corporation Counsel, has been referred to me for consideration.

I have carefully checked your review of the different ordinances bearing upon this subject and find that your synopsis of the same is so accurate and complete that I will quote portions of it as a partial basis for this opinion, viz.:

“Application has been made to this department for the erection of a community garage to be used exclusively by the tenants of a large apartment building. There will be more than one hundred apartments in the building and the garage will contain space to accommodate one automobile for each apartment. Proper frontage consent can be obtained, but the disturbing feature is the fact that a church is located within 200 feet of the proposed apartment building and garage.

“I have made a very careful study of the ordinances pertaining to this situation and there is a question in my mind as to whether or not I should withhold a permit for the erection of this community garage. I will outline the situation about as follows:

“Section 929 of the Chicago Building Code was passed originally in 1911. Several amendments were made to this section, but in its present form it contains all the requirements with reference to garages up to the passage of the Chicago Municipal Code of 1922. You will note that there is no differentiation in this section between public garages and private garages, although the distinction has always been made between such garages. This distinction was brought into ordinance form in the Chicago Municipal Code of 1922.

A public garage is there defined in sections 242 and 243 of article 11, chapter XI, requirements for frontage consent and the prohibition of their location within 200 ft. of a church or school are given in section 245 of the same article.

“In 1923, one year after the passage of the Chicago Municipal Code, the Chicago Zoning Ordinance was passed. In this ordinance garages are defined by paragraph (k) of section 2. The definitions are not as detailed as those contained in the Chicago Code of 1922, but the identity of public garages and private garages is absolute. We have now come to the meat of the whole question. In this same paragraph a brand new type of garage is introduced and defined, namely: a ‘community garage.’ It will be seen by the provisions of the last two sub-paragraphs of paragraph (a), section 7, of the Chicago Zoning Ordinance that ‘community garages,’ subject to certain restrictions, are permitted in an apartment district, but a community garage shall not have accommodations for a greater number of automobiles than there are separate dwelling apartments on the same lot. In paragraph (b), section 7, garages other than community garages are excluded from an apartment district.

“In consideration of the various types of garages, their privileges and uses under the ordinances, we, by elimination are forced to the conclusion that a community garage is nothing more or less than a place for housing a private car not used for business purposes. In a community garage no mechanics are employed, no service of any kind is given, no gasoline or other fuel, oil or accessories, or anything of that nature are sold or kept for sale; in fact, if a car needs washing or repairing other than repairs of a very minor nature this must be done outside and away from the community garage. In a private garage such service is permitted as persons, firms and corporations house their trucks, delivery wagons, etc., in a building where they make their own repairs by their own mechanics.

“The nuisance features of a public garage or a private garage consist principally of service, repairs and shop work done in such places. Such things are absolutely prohibited in a community garage. Under the

law it is simply space for housing an automobile on the same premises with the home of the owner. It is the practice of the Building Department on account of community garages partaking somewhat of the nature of a private garage to require frontage consent where such private garage or such community garage has accommodations for more than four privately owned automobiles.

"The question now arises as to the location of a community garage within 200 ft. of a church, public or parochial school or a hospital. It is to be noted that churches, schools and hospitals, as well as community garages are listed as conforming uses in an apartment zone. Under such conditions does the fact that a church, for instance, located within 200 feet of an apartment building, foreclose the residents of such apartment building from storing their privately owned automobiles on the same premises with their home, attention being especially directed to the fact that no garage privileges such as repairs, shop work and noises, and other nuisance incidental to the conducting of a public or private garage being permitted in a community garage.

"I feel that conditions of ownership and use of private automobiles in a four apartment building are no different from those in a building containing one hundred or more apartments, and that it is a wise provision in our building ordinances to restrict the location of a garage, either public or private, in which the nuisance feature of repairing cars, washing cars, cars stopping for service or purchase of gasoline, oil, accessories, etc., from within 200 ft. of a church, school or hospital. In a community garage where such nuisance features are absent and there seems no occasion for the rule, the rule probably should not apply.

"The giving of frontage consent is optional with the owner of abutting property, and I feel that where the church, hospital or school prohibiting feature is absent the owners of property in the same block where it is proposed to locate a community garage should have the privilege of giving or withholding their consent to this use of property, the same as those owners enjoy where there is no church, school or hospital within 200 ft. of the proposed garage.

"I realize at this point that I have discussed this subject at some length, probably in an argumentative fashion. I will ask your toleration as I have tried to make as plain a presentation of the subject of my question as possible, and will respectfully request your opinion and advice as to issuing a permit in this case."

The Zoning Ordinance of 1923, does make a distinction between public garages, private garages and community garages. The last sub-paragraph of paragraph A, section 7, is as follows:

"A private garage or private stable or community garage in connection with an A use in an Apartment district, limited in ground area to 15 per cent of the area of the lot, provided that a community garage auxiliary to an A1 use shall not be composed of a greater number of private garages than the number of separate dwelling apartments located on the same lot."

A1 Use—as defined in section 6 of the Zoning Ordinance is as follows:

"A1 Use—An A1 use shall include every use as an apartment house."

It is quite manifest that the City Council had in mind that the Community Garage was no more objectionable on a lot where a large apartment building is located than where a small apartment building is located. In other words, that there should be no discrimination in favor of an apartment building of two to four flats against an apartment building of more than four flats.

As you are aware, many large buildings lately constructed are co-operative flats, that is, each flat is separately owned. I can see no reason why the owner of such flat should not have a garage for his own personal use regardless of the number of owners, although the garage for each owner be located on the same plat of ground that is

occupied by the co-operative building, with the limitation that the private garages should be confined to a ground area of not more than 15 per cent of the area of the lot and that there should not be a greater number of garages than there are separate dwelling apartments on the same lot. In other words, one garage for each separate flat.

The Community Garage, as defined in the Zoning Ordinance, has none of the objectionable features that a public or private garage may have and should not be objected to simply because there might be a larger number of them for the accommodation of an equal number of flats.

In my opinion the 200 ft. provision referred to in your letter does not apply to Community Garages.

(No. 6120—November 15, 1927—F. J. C.)

1 COMMISSIONER OF BUILDINGS, WRECKED BUILDINGS, PROTECTION OF PUBLIC.

The Commissioner of Buildings has the power and it is his duty to take all necessary steps to protect the public against buildings which in the course of wrecking have become dangerous to life and limb.

2 COMMISSIONER OF BUILDINGS, LIABILITY.

The proper enforcement of building ordinances do not render the Commissioner of Buildings personally liable.

Hon. Christian P. Paschen, Commissioner of Buildings:

In response to your verbal request to define your powers with reference to the buildings in the course of being wrecked on La Salle street between Washington and Randolph streets, we desire to say that where the condition is so urgent as in the present case, your decision becomes final as to what is necessary to be done to protect life and property.

Section 409 of the Chicago Municipal Code of 1922 provides:

“Whenever the decision of the commissioner of buildings upon the safety of any building or any part thereof is made in a case which is so urgent that failure to properly carry out his orders to demolish or strengthen such building or part thereof may endanger life and limb, the decision and order of the commissioner of buildings shall be absolute and final.”

Section 410 of the same volume provides:

“Whenever it shall be necessary, in the opinion of the commissioner of buildings, to call upon the department of police for aid or assistance in carrying out or enforcing any of the provisions of this chapter, he shall have the authority so to do, and it shall be the duty of the department of police, or of any member of said department, when called upon by said commissioner, to act according to the instructions of, and to perform such duties as may be required by said commissioner in order to enforce or put into effect the provisions of this chapter.”

The enforcement of these particular sections of the Code or any section of the Code that has reference to the enforcement of the building ordinances in no way creates a personal liability against the Building Commissioner.

Section 400 of the Chicago Municipal Code of 1922 provides as follows:

“In all cases where any action is taken by the commissioner of buildings to enforce the provisions of any of the sections contained in this chapter or to enforce the provisions of any of the building ordinances of the city now or at any time hereafter in force, whether such action is taken in pursuance of the express provisions of such sections or ordinances or in a case where discretionary power is given by the ordinances of said city to the commissioner of buildings, such acts shall be done in the name of and on behalf of the city of Chicago, and the said commissioner of buildings in so acting for the city shall not render him-

self liable personally, and he is hereby relieved from all personal liability, for any damage that may accrue to persons or property as a result of any such act committed in good faith in the discharge of his duties, and any suit brought against the said commissioner of buildings by reason thereof shall be defended by the department of law of said city until the final termination of the proceedings therein."

The situation as we understand it is that pursuant to a judgment entered in a condemnation proceeding, the City acquired the right to remove and tear down portions of the buildings on La Salle street as above described for the purpose of widening La Salle street. This necessitated the wrecking of parts of these buildings to obtain the necessary space to widen the roadway in La Salle street. The property owners were made parties to this proceeding, and were paid compensation for the property taken.

It appears that the contractor who has charge of the wrecking of these buildings has notified the Building Department that when he has completed the wrecking called for in his contract these buildings will be left in an unsafe and dangerous condition, and that there is imminent danger and peril of these buildings falling and collapsing after he has completed his part of the work of wrecking. This being the case, there is no doubt that the situation would present one of grave and urgent danger both to the public and to persons who may be occupying the building.

It is our opinion that you may act in this matter by the use of police officers to warn the public from entering any of these buildings where the public's life and safety are in jeopardy.

(No. 6121—November 16, 1927—L. H.)

STREETS AND ALLEYS, HEAVY VEHICULAR TRAFFIC,
REGULATION.

A city or village has no power to prohibit heavy vehicular traffic upon all streets without making a careful survey and scientific study of the situation, but may turn over to the park authorities certain streets for exclusive use as pleasure driveways and establish not to exceed two pleasure driveways which do not connect with or lead to parks.

Hon. A. K. Mose, Alderman, 50th Ward:

In your letter of recent date you called attention to a resolution introduced in the City Council by you, on July 25, 1927 (Council Journal, p. 968), relative to heavy traffic. The resolution, which was referred to the Committee on Traffic Regulation and Public Safety, called for the submission of an ordinance prohibiting the use of residential streets by heavy traffic vehicles and restricting such traffic to section and quarter section line streets. No request for such an ordinance or for an opinion has been made by the Committee, but you state in your letter that you desire to have an opinion on this subject for use before the Committee. You do not say just what precise questions you have in mind, but we presume you want to know in a general way whether an ordinance of the character indicated would be lawful.

We beg to refer you to an opinion which answers many questions that might arise in the consideration of this subject. It appears under date of October 13, 1926, on page 391 of volume XV of the Opinions of the Corporation Counsel and Assistants.

The General Assembly has from time to time passed Acts which grant powers to park boards to establish and maintain pleasure driveways with the consent of the corporate authorities and the consent of the owners of a majority of

the property abutting on the proposed pleasure driveway. The principal Acts of this kind are the Act of 1879 and the Act of 1895, both of which provide for taking over, regulating, improving and maintaining public streets leading to or connecting parks. (Cahill's Stat., 1927, pp. 1812-1814.) Under these and other Acts supplementing such powers it is possible for the City to turn over streets to the park authorities for pleasure driveways to the extent that may be desired, subject to the test of reasonableness. Besides authorizing park boards to establish pleasure driveways, the Legislature has given power to cities and villages, under the Act of March 27, 1889 (Cahill's Stat., 1927, p. 533), to establish not to exceed two pleasure driveways which do not have to connect or lead to parks.

You will observe, therefore, that the City cannot designate all residential streets as pleasure driveways. We do not assume, however, that such is your purpose; but that what you have in view is the exclusion of the very heavy traffic from such streets. This would bring the whole matter within the question of what is reasonable under all the circumstances, and as to that we can only speculate.

The extent to which the City may restrict the use of a street so as to protect the pavement and the public, and at the same time so as not to unreasonably interfere with its legitimate use as a street cannot be stated in exact terms. It may be permitted to go to great lengths in some classes of streets or at certain hours of the day, but this will depend entirely on the conditions and on the facts and circumstances. Restrictions may be imposed if it can be shown that they tend to promote the safety, health or comfort of the public. But we feel quite sure that any general cutting off of heavy traffic from all but the section and quarter section lines will be regarded by the courts as unreasonable.

In *Barnes v. Essex County Park Commission*, 86 N. J. Law 141, the general principle of restricting certain streets from heavy vehicular traffic was upheld, and at the same time an ordinance prohibiting grocery delivery wagons from using the street was declared invalid, the court saying that the protection of the highway in question does not require the exclusion of such vehicles. In the case of *Brown v. Nichols*, 93 Kan. 737, the court held that municipalities may confine the passage of heavily loaded traffic vehicles to certain streets and exclude it from others, but it cannot deprive a citizen of access to his business nor so limit the use of the street as to exclude any of the recognized means of travel.

We could enlarge on the decisions, but do not think we could lay down any general rule which would be safe to follow in all cases. Before a valid and effective ordinance could be enacted there would probably have to be a survey made, and the restrictions would have to be based on a scientific study of the situation.

(No. 6122—November 17, 1927—L. H.)

MUNICIPAL EMPLOYEES, SALARY IN CASE OF DEATH,
PAYMENT.

The widow of a municipal employee is not entitled to the payment of her husband's salary during the time the position is not filled after his death unless she has been appointed in his place and performs the same services.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of your letter of recent date, to which was attached a communication from Mrs. Esther E. Ericson, the widow of the late John Ericson, City Engineer. Mrs. Ericson's letter calls attention to the fact that her

late husband was in the employ of the City for forty-three years, that since his death the position occupied by him has not been filled, and requests that the salary that would have been due to him, if he had lived, should be paid to her. In your own letter you state that Mr. Ericson died on April 16, 1927, and that your Committee would like an opinion as to the right of the City to pay to Mrs. Ericson the salary that attaches to the position of City Engineer, from the date of the death of her husband to the present time.

While it appears, from a memorandum attached to these letters, that the City Engineer's salary has not been paid to any one since Mr. Ericson's death, we are unable to advise you that payment to Mrs. Ericson would be lawful. The only way that could have been done, would have been to appoint her temporarily to the position. That was not done, however, and therefore, there is no legal way of paying the compensation to her.

Unless Mrs. Ericson has some claim on one of the pension funds of the City, we know of no way in which the City can pay her on account of the long service rendered by her late husband.

(No. 6123—November 21, 1927—L. H.)

1 DRIVEWAYS, CONSTRUCTION, PERMIT.

A permit for a driveway to a filling station may be issued by the Commissioner of Public Works without referring the application to the alderman in whose ward the station is located, where the driveway will be of the same grade as the sidewalk constructed according to existing ordinance requirements.

2 MUNICIPAL CODE OF 1922.

Section 3566 of the Municipal Code of 1922 permits issuance of permit for construction of driveway which will not depress or elevate the regular grade without referring the application to the alderman of the ward in which the driveway is to be constructed.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your communication of the 12th instant refers to this department the request of Messrs. Winston, Strawn & Shaw, on behalf of their clients, for permits for four sixteen-foot driveways to be maintained in connection with the use of the southeast corner of Cottage Grove avenue and East 57th street for filling station purposes. You state that it has been your custom to refer applicants for such permits to the aldermen of the wards in which it is proposed to locate them; that this was referred to Alderman Grossman of the 5th Ward, who has withheld approval. You ask whether it is mandatory under the ordinances to issue this permit.

It appears from the letters, bond and blueprint which you submitted that the proposed driveways are to be sixteen feet wide, that they will not elevate or depress the regular grade of the sidewalks, that they will be constructed in accordance with the ordinances and the blueprint filed in your department which complies with existing ordinances, that a satisfactory bond has been presented, that the necessary frontage consents have been filed,

that the Commissioner of Buildings has issued a permit for a filling station, and that the Fire Commissioner has given a permit for the placing of gasoline storage tanks upon the property in question.

From these facts it is plain that permits for the proposed driveways may be issued by the Commissioner of Public Works without referring the application to the City Council, under that part of section 3566 of the Chicago Municipal Code of 1922 which reads as follows:

“Council orders providing for driveways over sixteen feet wide shall be referred to the committee of the city council having charge of matters concerning streets and alleys. Driveways over sidewalk space which do not elevate or depress the regular grade of sidewalks may be established, built, constructed and maintained upon permits issued by the commissioner of public works without council order; * * *.”

The customary reference to the alderman of the ward in such cases is to give him an opportunity of presenting such objections as may constitute a valid obstacle to the issuance of the permit, and is more a matter of courtesy than an obligation on your part. If objections are filed we will be glad to pass upon them, but in the absence of any showing which would entitle the objectors to further investigation and possible refusal, you are bound to issue a permit in accordance with the provisions of the article of the Code relating to driveways. There is nothing in the ordinance which gives the Commissioner of Public Works any discretion in the matter if all requirements of the ordinance are complied with.

(No. 6124—November 21, 1927—L. H.)

1 WEIGHTS AND MEASURES, INSPECTION, LIQUID MEASURING DEVICES.

Automatic pumps or measuring devices used in the sale of oil to motorists must be regularly and periodically inspected and sealed, notwithstanding the use of tested standard measures for the purpose of the delivery of oil to dealers, as the testing in the two instances does not constitute a double charge.

2 WEIGHTS AND MEASURES, POWER TO PROVIDE FOR.

The power of the City to provide for inspection of weights and measures is derived from the Cities and Villages Act; which power is in no way limited or repealed by the act of the Legislature on the same subject.

3 WORDS AND PHRASES.

The words "used for" and "using" in sections 4169, 4179 and 4180a of the Municipal Code of 1922 refer to devices for pumping as well as measuring.

Hon. Daniel A. Serritella, Inspector of Weights and Measures:

Your recent letter concerning the interpretation to be given to the ordinances governing the inspection and sealing of liquid measuring devices was referred to the undersigned for consideration and reply.

The question arises over the use of what are commonly called pumps, used in the sale of oil to motorists, where the oil is drawn from automatic liquid measuring devices into a tested standard liquid measure and delivered to the car from these measures. The contention of the dealers is that when they use such tested standard measures for the purpose of the delivery of the oil there is no justification for the charge for inspection of the pumps. Your department, on the other hand, proceeds on the theory that under sections 4169, 4179 and 4180A of the Municipal Code of 1922, such automatic pumps or measuring devices must be regularly inspected and sealed.

It appears from your letter that the pumps in question are equipped with positive quantity stops. That is to say, a pump can be set to discharge a pint, a quart or some definite quantity, or it may have an adjustable rod running down into the reservoir with a set screw on the end of the rod that can be turned to regulate the length so that one turn of the pump handle will draw out a definite quantity. You also state that some dealers acknowledge that they use them for measuring, while others insist that they sell their oil by measuring in the tested measures that they use for delivering the oil and that to charge for inspecting the pumps constitutes a double charge.

Section 4169, as amended on July 22, 1926, makes it the duty of the inspector of weights and measures to inspect and examine periodically all weights, measures, etc., "used for weighing and measuring in the city." Automatic or mechanical pumps or liquid measuring devices are specifically included in this enumeration.

Section 4179 imposes the duty of having weights, measures, etc., inspected and sealed on "every person using weights, measures, scale beams, patent balances, steel yards, or any instrument, in weighing or measuring any article intended to be purchased or sold. * * *"

The section (4180A) which relates particularly to automatic pumps, which was passed July 22, 1926, reads as follows:

"Any person, firm or corporation owning, operating or using any automatic or mechanical pump or liquid-measuring device for the purpose of measuring any liquid commodity to be sold or offered for sale within the City of Chicago, shall provide proper tested standard measures, and shall each day before making the first sale in the morning, and always before commencing to sell a new supply of liquid, test the accuracy of the device so in use.

“Any person, firm or corporation using such automatic or mechanical pump or device without first having obtained the certificate of approval from the inspector of weights and measures as provided for in section 4169, or any person using any such automatic or mechanical pump or device that is incorrect or defective, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.”

We apprehend that the difficulty you are encountering is due to the fact that the sections quoted, and others that might be referred to, all base the requirements on the use of the various articles and appliances for weighing and measuring. If the words “used for” and “using” are to have such a narrow construction as is contended for by the persons who object to the inspection, then there might be some ground for their contention where the devices in question are only used for pumping purposes and not for measuring. But we are of the opinion that the use which these instruments are put to brings them within the terms of the Ordinance.

In determining this question it will be helpful to note the difference between the wording of the ordinances of the City as compared to the wording of a similar provision in the statutes. In section 7 of an act entitled “An Act in relation to weights and measures” (Cahill’s Stat. 1927, p. 2496) it is made the duty of the Director of Trade and Commerce, in those parts of the State in which a City Sealer is not required to be appointed “To inspect, test, try, and ascertain if they are correct, all weights, measures, and weighing or measuring devices kept, offered, or exposed for sale, sold or used or employed by any proprietor, agent, lessee, or employee in proving the size, quantity, extent, area, or measurement of quantities, things, produce or articles for distribution or consumption purchased or offered or submitted by such person or persons for sale, hire, or *reward*; * * *.”

It will be seen that so far as the State law is concerned the intention was to limit the inspection to such instruments or measures as are actually used for weighing and measuring. Even under the provision just quoted, however, the possession of such an instrument or measure by a person who sells an article or commodity which can be weighed or measured by it and its presence in the place of business where such article or commodity is sold is *prima facie* evidence that it is being used for that purpose, and the burden of proving that it is not so used would be on the person who seeks to avoid the charge for inspection. This would be especially so if the device was actually in use even if not used for purposes of measurement.

The City ordinances do not limit the inspection so narrowly. The words "used for" and "using" do not necessarily mean that the use must be for proving the measurement. Such a use as is described in your letter, and which is further verified by verbal explanation given to the writer, clearly constitutes such a use as is contemplated by ordinance. There would be no purpose in having a pump with a measuring device attached, and using it for drawing oil if its only function was to pump the oil. In addition to all this, you say it is admitted by some dealers that they do use the pumps for measuring. Since they are all used for drawing the quantity of oil required by a customer, are capable of measuring, and in many instances are actually used for measuring, it is unreasonable to assume that the devices are not used in such a way as to make it essential that they be kept in proper condition, which can only be accomplished by periodical inspection.

Lest it be assumed that the language of the Statute which we have quoted in some way governs or limits the ordinances with respect to this matter, we call attention to the

fact that the Weights and Measures Act does not alter or repeal any provision of the Cities and Villages Act.

“The contention is that the ordinance is void for the reason that the legislature had fixed a standard of weights and measures before the ordinance was adopted, and the city council was without power to provide penalties for making a sale or sales of the commodities in question not in accordance with the standards established by the statute, and, further, if the Cities and Villages Act which went into effect July 1, 1872, was broad enough to confer the power to adopt the ordinance in question, the Legislature of the State, in passing the Act of February 27, 1874, in relation to Weights and Measures, revoked and recalled the provisions of the Cities and Villages Act which conferred the power on cities, and resumed the exercise of that power itself.

“In our opinion the grounds urged against the validity of the ordinance are not well founded. We find nothing in the Act relative to weights and measures indicating an intention, expressly or impliedly, to change, alter or repeal any provision of the Cities and Villages Act. There is no necessary antagonism between the Acts.” *City of Chicago v. Bartels*, 146 Ill. App. 180.

The power of the City with respect to the inspection of weighing and measuring devices is contained in clauses 55 and 56 of section 1, of article V, of the Cities and Villages Act. The power delegated there is complete, as will appear from the language:

“Fifty-fifth. To provide for the inspection and sealing of weights and measures.

“Fifty-sixth. To enforce the keeping and use of proper weights and measures by vendors.” Cahill’s Stat., 1927, p. 314.

From the above it appears that the enforcement of the keeping and use of proper weights and measures by vendors is not all that is contemplated. The City is given

the further power to provide for inspection and sealing, and this power is not limited. Hence, if it is deemed proper to require all measuring devices to be inspected and sealed, the City has the power to compel it.

Our conclusion, therefore, is that such automatic liquid measuring devices, used by dealers as indicated in your letter, are subject to the periodical inspection required by Ordinance.

(No. 6125—November 22, 1927—M. H. F.)

1 ORDINANCES, AMENDMENT, REPEAL OR SUSPENSION.

A general City ordinance cannot be amended, repealed or suspended by an order or resolution of the City Council but must be done by an act of equal dignity and with the same formalities as are required for the passage of an ordinance.

2 FRONTAGE CONSENT, SCHOOL ETC. DISTRICT.

Whether a building is or is not used regularly as a school, hospital, church or theatre adjacent to a proposed site for a filling station must be determined by the department or official issuing the permit as a matter of fact and to its or his own satisfaction.

Hon. A. K. Mose, Alderman 50th Ward:

Your communication of November 21, 1927, relating to proposed gasoline filling station at 6006 North Clark street, has been referred to me for reply.

You state that the owner of the property and proprietor of the proposed station has complied with the City ordinance pertaining to frontage consents and has secured a permit from the Fire Prevention Department. That on July 25, 1927, you introduced in the City Council an "ordinance" reading as follows:

"Ordered, That the Commissioner of Buildings and the Fire Commissioner be and they are hereby directed

to construct and maintain a gasoline filling station to be located at 6006 North Clark street."

It is assumed that by "ordinance" you mean "Council Order."

You also state that the site in question is adjacent to a building that was formerly operated as a Parental School, Board of Education property, but that no school is now being maintained thereon, or will be in the future.

It is further stated in your letter that the Building Commissioner, notwithstanding the above mentioned Council Order, refuses to issue a building permit "on the grounds of the school being adjacent."

You request the opinion of this office as to whether a school now exists adjacent to the proposed station site.

We have examined the Journal of the Proceedings of the City Council for July 25, 1927, and find therein recorded, on page 967, the Council Order referred to, and the notation that your motion to pass the same prevailed.

The passage of this Council Order is, however, as we see it, immaterial, for the reason that it would not be binding upon the Commissioner of Buildings if the effect of it were to be to amend, repeal or suspend a general City ordinance. We understand the law to be well settled that an order or resolution of the City Council will not amend, repeal or suspend an ordinance. An ordinance can only be amended by an act of equal dignity and with the same formalities as are required for the passage of the ordinance in the first instance. See opinion dated April 22, 1925, Opinions of the Corporation Council, 1925-1926, page 40, wherein it is stated: .

"Our Supreme Court has repeatedly held that an ordinance of the city cannot be amended, modified, suspended, or repealed by an order, and that, where

the terms and provisions of an ordinance and an order are in conflict, the order must give way to the ordinance. 173 Ill. 91; 174 Ill. 439; 203 Ill. 23; 214 Ill. 102; 207 Ill. App. 570."

Paragraph 2279 of the Chicago Municipal Code of 1922, referring to gas filling tanks, reads in part as follows:

"No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater."

While it is hardly within the province of this office to make an investigation and determination of the facts in your matter, we are always glad to advise you upon the law to the best of our ability.

It seems proper that the Building Commissioner should be satisfied that the adjacent property is no longer used for school purposes and that the proposed filling station site is not within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater. Perhaps the Board of Education might readily supply the Building Commissioner with the necessary facts in this case.

It is our opinion that the Commissioner of Buildings may properly issue a building permit in this case provided it shall be determined to his satisfaction that the adjacent Board of Education property is no longer used for a school, and provided all necessary City ordinance requirements and formalities have been complied with.

In an opinion rendered by this office November 12, 1926 (Vol. XV, Opinions of the Corporation Counsel, page 430) we had under consideration the question of installation of a filling station at 701 Oakwood boulevard within 65 feet of a building known as St. James M. E. Church.

It appeared that the church building was not being used for church purposes. In the opinion it is stated:

"The question arises whether the St. James M. E. Church at 701-705 Oakwood boulevard, which is within 200 feet of the plot of ground in which the tanks are to be installed, is used for a church within the meaning of the ordinance.

"A church within the meaning of the above provisions must be construed as including any building which is regularly used for purposes of divine worship. See Opinions of Corporation Counsel of 1912, page 833.

"It is evident that the St. James M. E. Church at 701-705 Oakwood boulevard is not being regularly used for purposes of divine worship at the present time.

"While the building thereon is built in the usual form of a church structure, yet the use of the building rather than its architecture is what controls, as the prohibition contained in the ordinance reads 'any lot or plot of ground used for a church * * *.' See Opinion of Corporation Counsel to Superintendent of Police, October 20, 1926.

"It is our opinion that, in so far as we are advised, the plot of ground in which the proposed tanks are to be installed is not within 200 feet of a plot of ground 'used for a church' at the present time within the meaning of the provision of the above ordinance."

By analogy, this opinion would seem to be controlling and in case the adjacent property is no longer used for a school, it is our opinion that section 2279 of the Code would not prevent, on the score of school use of contiguous property, the installation of the filling station in question.

We are sending a copy of this opinion to the Commissioner of Buildings, also a copy to the Business Manager, Board of Education.

(No. 6126—November 29, 1927—L. H.)

LOCAL IMPROVEMENT BONDS, RETIREMENT.

Under section 43 of the Local Improvement Act before its attempted amendment, the calling in of the bonds was possible only once a year, unless there was a voluntary surrender in response to a call. As section 43 was attempted to be amended with other sections it is objectionable because (1) it permits the naming of any officer besides the Treasurer to act for the City in calling the bonds (2) it fixes a wrong time for the calling of the bonds (3) it necessitates a duplication of the accounts in the Comptroller's and Treasurer's offices (4) it retards the handling of the payment of the bonds; and (5) it requires extra expense for accounting and for interest. But on account of the failure to include section 43 in the title of the Act as amended, the section before its attempted amendment is still in force and effect.

Hon. Charles C. Fitzmorris, Comptroller:

In reply to your letter of the 18th instant concerning the amendment of section 43 of the Local Improvement Act, we submit the following:

The said section 43 of an act entitled "An Act concerning local improvements," provides for the retirement of special assessment bonds before they are due when there is sufficient money on hand to pay all or any portion of an issue. Under this section before amendment such calling in of bonds was possible only once a year, unless there was a voluntary surrender in response to a call. The law provided that, on or before January 10th of each year, the treasurer, "or some other officer designated by ordinance for that purpose," should ascertain the amount available for purchases of such bonds, select by lot the bonds to be paid, give notice by letter and by advertisement of the intention to call in such bonds, and thereupon they would be payable on the following 10th of February and would cease to bear interest thereafter. The said section at that time was as follows:

"On or before January tenth of each year the treasurer of the municipality issuing such bonds, or some other officer designated by ordinance for that purpose, shall ascertain the amount of such assessment collected and applicable to the payment of bonds of each series unmatured, and shall select by lot bonds of series, to such amount, to be paid therewith, and shall give notice in some newspaper published in such municipality (or if none be so published, then in the nearest newspaper), of the number of bonds to be so paid, the series thereof, the assessment to which they relate, and the particular bonds so selected to be paid, and that the same will be paid, at a place to be specified, on the tenth day of February next following. And, thereupon, from and after said tenth day of February, said bonds shall be payable, at the place so appointed, on demand, and no further interest shall accrue thereon." Smith-Hurd's Stat., 1925, p. 452.

The question of making more frequent calls was often considered by the Department of Law in response to requests from the Comptroller. The last time an opinion was written on the subject was under date of October 11, 1926. See Opinions of the Corporation Counsel and Assistants, volume 15, p. 389.

In the opinion just mentioned it was stated that unless the law was changed there was no way of compelling the holder of bonds to surrender them for payment after the annual call had been made, but that if another call is made and the holder of bonds surrenders them voluntarily the bonds could be taken up.

There was no request made by either the Comptroller or any one else connected with the City for a change in the law in this respect, but apparently there was some demand for such a change from other parts of the State, since Senator Hicks, by an amendment to a pending bill, undertook to bring this about. In making the amendment, the provision authorizing some other officer besides the

Treasurer to be named by ordinance was left out. This effort to pass a new section 43, however, although apparently acquiesced in by the General Assembly and the Governor, was futile, owing to an omission which renders the new section unconstitutional.

The bill to which this amendment was attached was House Bill No. 284, introduced by Representative Weiss of Waukegan. In its original form it was a bill amending sections 11, 44, 63, 76 and 79 of the Local Improvement Act. It passed the House and had reached third reading in the Senate without change. On June 15, 1927 (Journal, pp. 18-19) the bill was recalled to second reading, on motion of Senator Hicks, and amended by adding thereto an amended section 43, a new section 74a, and an amended section 81.

There was no amendment of the title, but the bill, amended as above set forth, was passed by the Senate, concurred in by the House, and signed by the Governor. We have had these matters verified, not only by reference to the Journal, the printed Session Laws, and the new editions of the statutes, but to make certain have secured a photostatic copy of the bill as passed.

When House Bill 284 was first introduced, in accordance with our custom in such matters, we sent a copy to the attorney for the Board of Local Improvements. No serious objection was discovered—in fact, there was nothing in the bill at that time to object to. It was the amendment of the bill in its final stages that made it obnoxious.

The failure to amend the title of the Act renders it unconstitutional so far as the three new sections are concerned. Section 13 of article IV of the Constitution provides, among other things, as follows:

“No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.

But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; * * *."

In such a case as the one before us the first sentence quoted above has been construed to mean that although various things could properly be joined if they all relate to one general subject, yet, if the title of the Act is restricted by the General Assembly to a particular branch of the general subject all other branches of the general subject must be excluded. *Sutter v. People's Gas Light & Coke Co.*, 284 Ill. 634; *People ex rel. Stuckart v. C. B. & Q. R. R. Co.*, 290 Ill. 327.

Hence, under the constitutional provision above quoted, sections 11, 44, 63, 76 and 79, as amended by House Bill 284, were passed in accordance with the constitutional requirements and have become law, while the new section 43, section 74a, and the new section 81, must be held void. This leaves sections 43 and 81 as they were before this attempted revision.

In altering section 43, the amendment not only changed the provision respecting the time when bonds could be called (which would not have been objectionable to us), but it also wiped out the provision that made it possible to name another officer besides the Treasurer to act for the City in calling the bonds. This latter change, you inform us, would render the ordinance imposing this duty on the Comptroller invalid, would necessitate a duplication of the accounts of the Comptroller in the Treasurer's Office, would retard the prompt handling and payment of the bonds, and cause extra expense for accounting and for interest. By reason of the failure to properly include section 43 in the title of the Act this highly objectionable result is obviated.

(No. 6127—November 30, 1927—F. J. C.)

SPECIAL POLICEMAN'S BOND, LIABILITY, RELEASE.

The liability of a bonding company to the City of Chicago and the Commissioner of Police upon a special policeman's bond extends after the expiration of the term of the appointment if the act creating the liability on the part of the special policeman took place during the term; therefore no release of liability can safely be given in advance of a knowledge of such liability.

Hon. Michael Hughes, Superintendent of Police:

We are in receipt of your letter of November 18th, enclosing letter from Metropolitan Casualty Insurance Company relative to bonds for special policemen employed by Railroad Companies and by the American Express Company, also specimens of the bond issued and a report from Deputy Superintendent Alcock, relative to the same.

You request an opinion as to whether your department should or could issue statements from time to time relieving the Insurance Company from liability on expiring bonds. We note from the condition in the bond that the condition is such that whereas "the above bounden principal was heretofore appointed a special policeman in the City of Chicago by the Superintendent of Police of the City of Chicago in and by an instrument in writing bearing even date herewith," and the further condition that the principal faithfully discharge all the duties now required and which may hereafter be required of such policeman by law to act as such special policeman and that said principal shall save and keep harmless the City of Chicago and the Superintendent of Police from any and all claims which may be paid by them or either of them or which may be recovered against them in consequence of any acts, defaults, neglects, etc., chargeable to the special policeman.

Sections 3109 to 3111 of the Chicago Municipal Code of 1922 have reference to the appointment of special policemen.

Section 3109 defines what a special policeman is and makes it unlawful for any person to follow the occupation of special policeman without first being appointed and licensed as provided in the ordinance.

Section 3110 gives the Superintendent of Police the power on the application of any person showing the necessity thereof, to appoint and swear in any number of special policemen to do special duty at any fixed place in the City of Chicago at the expense of the person or persons by whom the application is made. It provides for the manner of examination of the applicant and provides for the qualification of such applicant.

Section 3111 provides that "every person so appointed a special patrolman shall pay in advance an annual license fee of \$5.00. The Superintendent of Police shall issue a special certificate of appointment to each of said special patrolmen, which said certificate shall expire one year from the date of its issuance, and no certificate of appointment shall be issued for any fee less than the full annual license fee. The Superintendent of Police shall have the power to renew any such appointment for a period of one year upon the payment of the annual license fee for such new period and he shall keep a correct list of all persons so appointed."

The appointment or commission of these special policemen is limited to a period of one year and the bond recites that such commission, becomes part of the bond. The liability under this bond would cover such a period of time as is fixed in the commission or appointment. The bonding company or surety company would be liable under the bond for all such claims as are enumerated in the bond

which occur by reason of any default or neglect of duty on the part of the special policeman, and while the liability for such act is limited to acts during the term of the appointment or commission, the liability of the bonding company does not cease upon the expiration of the term of the commission or appointment because through some act of the special policeman during the time of his appointment there may have been created some liability against the City of Chicago or the Superintendent of Police against which the statute of limitations had not become a bar. The bonding company would be liable to the City of Chicago and the Superintendent of Police even after the expiration of the term of the appointment if the act creating the liability on the part of the special policeman took place during the term of such special policeman's appointment.

For these reasons it is our opinion that your department should not issue statements from time to time relieving the Insurance Company and bonding company from liability on expiring bonds.

(No. 6128—November 30, 1927—G. F. M.)

BENEFIT FUND, PAYMENT.

Refunds due an employee who is not a policeman and who has died is payable to the child or children of the deceased or to the heirs if there are no children. In case of a policeman, the refund is payable to the executor or administrator when there are no children.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

The formal demand of Chester R. Davis, Assistant Trust Officer of the Chicago Title and Trust Company, as Exec-

utor of the estate of Henry Horstmann, for the payment of any sum (stated to be in the amount of \$1113.68) which may be to the credit of Mr. Horstmann in the Municipal Employees Annuity and Benefit Fund, has been referred by you to this office for attention.

Section 39 of the Municipal Employees Annuity and Benefit Fund Act, in force July 1, 1921, (Smith-Hurd's Stat. 1927, p. 587), in paragraph (e) of said section specifically provides as follows:

"In any case in which an amount equal to the total amount accumulated and credited to the account of a deceased municipal employee from sums deducted * * * from the salary of such municipal employee for annuity purposes in accordance with the provisions of this Act, and the sums deducted from the salary of such municipal employee or otherwise paid by him according to law and applied to any municipal pension fund * * * described in section 52 or section 52½ of this Act shall not have been paid to such municipal employee, and in the case of a married male municipal employee to such municipal employee and the widow of such municipal employee both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts, and the entire amount paid in form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the children of such municipal employee, in equal parts to each, unless such municipal employee shall direct in writing, sworn to before an officer authorized to administer oaths in this State, and filed with the retirement board before the death of such municipal employee, that any such amount shall be refunded and paid to any one or more of such children and if there be no such children such amount shall be refunded and paid to the heirs of such municipal employee according to the law pertaining to estates of deceased persons; *provided*, if any child or children of such municipal employee shall be less than eighteen (18) years of age such part or all of any such amount as shall be

equal to the sum necessary to pay annuities in accordance with the provisions of this Act to such child or children shall not be refunded as hereinbefore stated to any child, or children, or heirs at law of such municipal employee but shall be transferred to the child's annuity fund (hereinafter described) of the annuity and benefit fund herein provided for and used therein for the purpose of paying annuities to children. As amended by act approved June 8, 1923. Laws 1923, p. 204."

The Policemen's Annuity and Benefit Fund, in force July 1, 1921, originally contained the same provision, but the Legislature, at its last session, enacted an amendment to the Policemen's Act which provides that the refund may be paid to an Executor or an Administrator when there are no children.

The Municipal Employees Annuity and Benefit Fund Act does not give the Board any power or authority to pay this refund to an Executor but specifically requires that the same shall be paid to the child or children of the deceased, or if there be no children, then to the heirs of the deceased.

Under these circumstances the Retirement Board of the Municipal Employees Annuity and Benefit Fund can not legally comply with the demand made by the Chicago Title and Trust Company through its Assistant Trust officer, Mr. Davis.

(No. 6129—November 30, 1927—G. F. M.)

DISABILITY BENEFITS, FEMALE EMPLOYEE.

The mere fact that a female employee has become a mother does not entitle her to receive ordinary disability benefits three months after the event of motherhood had taken place, without complying with section 47 of the Municipal Employees' Benefit Act.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

Replying to your request for an opinion as to whether or not a female employee of the City is entitled to receive ordinary disability benefits for a period after she has become a mother, the following is submitted:

Your letter states that a female employee of the City and a participant in your fund gave birth to a child on October 26, 1926; that she claims that her doctor would not permit her to return to work until February 1, 1927; that she does not give any specific reason for such delay in returning to work.

Section 47 of the Municipal Employees Annuity and Benefit Fund Act provides for ordinary disability for Municipal employees in the service who shall become disabled as the result of any cause other than an injury incurred in the performance of an act or acts of duty; that proof of disability shall be furnished to the Retirement Board by at least one licensed and practicing physician appointed by said Retirement Board and that said Retirement Board may require other evidence of disability. The requirement of the statute is very specific. In the absence of such proof of disability as the statute requires to be furnished, your Honorable Body is not legally empowered to grant ordinary disability. I am of the opinion, however, that upon complying with the requirements of section 47 of the Act relating to proof of disability, the employee in question would be entitled to disability benefit.

(No. 6130—November 30, 1927—G. F. M.)

1 PENSIONS, REINSTATED EMPLOYEE, CIVIL SERVICE.

In computing the term of service of a municipal employee who had been reinstated subsequent to January 1, 1922, after a discharge from the service in 1916, the period of service rendered prior to the time of reinstatement may be included for age and annuity purposes, but no credit can be given for sums paid into any municipal pension fund prior to his discharge in 1916, for prior service annuity.

2 WORDS AND PHRASES.

"Present employee." The setting aside of a discharge from service and reinstatement does not make one "a present employee" of the City for the purpose of an annuity.

3 WORDS AND PHRASES.

A "future entrant" is one who is employed by the City for the first time subsequent to January 1, 1922, and does not include one who was employed and discharged prior to said date, but was reinstated subsequent to said date.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

Replying to your request for an opinion as to the pension rights of a former City employee who was discharged and afterwards reinstated, the following is submitted:

Your letter states that William D. Foley an asphalt foreman on P. R. 3449, Department of Streets, was certified on May 11, 1912; that he was discharged on January 11, 1916; that during his time of service he was a member of the Pension Fund of 1911 and a contributor thereto; that he did not withdraw the money which he had paid into the old fund; that on May 20, 1924, the order of discharge entered January 11, 1916, was set aside and he was reinstated to the list. Your question is as to whether Mr. Foley is entitled to any prior service accumulation for the time between his original certification and January 1, 1922; also, is he a present employee or a future entrant?

As Mr. Foley was not in the employ of the City or the

Board of Education, on December 31, 1921, he is not a "present employee" within the definition of that term.

As Mr. Foley is not a Municipal employee who is now employed as a Municipal employee of such City for the first time, on and after January 1, 1922, he is not a "future entrant" within the definition of that term.

Section 36 of the Municipal Employees Annuity and Benefit Fund Act provides that any Municipal employee in the same situation as Mr. Foley, shall not have any right to be credited with any sum or sums for prior service annuity and widow's prior service annuity and shall not have any right to prior service annuity. However, the period of service rendered by such Municipal employee prior to January 1, 1922, shall be included in computing the term of service of such Municipal employee for age and service annuity and widow's annuity purposes.

Section 51 of the same Act provides that in computing the term of service rendered by a Municipal employee prior to January 1, 1922, the entire period of time beginning on the date when such Municipal employee was first appointed to the service and ending on December 31, 1921, except any intervening period of time during which such Municipal employee shall have been separated by resignation or discharge from the service, shall be counted as a period of service for all purposes of the Act.

(No. 6131—December 2, 1927—L. H.)

1 ALDERMANIC NON-PARTISAN LAW, REPEAL OR MODIFICATION.

The Non-partisan Aldermanic Election Act was passed under section 34, article 4, of the Constitution of 1870, known as the Charter Amendment, and can only be affected by direct legislation ratified by a majority of the people in the City voting upon the question.

2 MUNICIPAL GOVERNMENT, REFERENDUM.

Laws affecting municipal government of Chicago, whether original or by way of amendment or appeal require the consent of a majority of the legal voters of the City voting upon the question of adoption before the law can become effective.

3 WORDS AND PHRASES.

"Charter Amendment" is section 34, article 4, of the Constitution of 1870, which requires all laws relating to municipal government of Chicago whether original or amendatory to be approved by a majority of the legal voters of the City voting upon the question before the law can become effective.

Hon. Oscar F. Nelson, Chairman, Committee on Judiciary and Special Assessments:

In your letter of the 29th ultimo you stated that at the meeting of the Committee on Judiciary and Special Assessments held on that day, the question was raised as to whether or not the Aldermanic Nonpartisan Law is in jeopardy on account of the litigation now pending in the Supreme Court concerning the Primary Law. You stated further that you were directed to request an opinion from us on this subject.

The question as to whether the Nonpartisan Aldermanic Law is affected by the Primary Act recently passed probably arises from the fact that in section 1 of the Primary Act it is provided that the nomination of all candidates for all elective offices, including City offices, shall be made in the manner provided in that Act. If the Supreme Court,

in the litigation now pending, should hold the entire Primary Act invalid, then of course there will be no change in the manner of electing any City officer. Your question, therefore, is directed to the situation that would prevail in case this Primary Law was held valid.

The Nonpartisan Aldermanic Election Act was passed under what is generally called the Charter Amendment, viz., section 34 of article IV of the Constitution. Under that section no law based upon it affecting the municipal government of the City of Chicago can take effect until it has been consented to by a majority of the legal voters of the City voting on the question of its adoption. The Act about which you inquire was passed under this amendment and adopted in conformity therewith. See Cahill's Statutes, 1927, pp. 360-363.

An Act passed under the Charter Amendment and ratified by the people cannot be repealed or amended by the Legislature without the formality of a vote of the people. This was a much mooted question until finally determined by the Supreme Court in the case of *People ex rel. Egan v. City of Chicago*, 310 Ill. 534. In that case the court said, among other things (p. 541):

"The amendment requires both the act of the legislature and the vote of the people before any law based upon the amendment affecting the municipal government can take effect. The same act and vote must again concur before a law changing the previous one can take effect. It would be an entire perversion of the amendment, which was intended to confer on the people of Chicago control of legislation affecting their local government, if they should now learn that the whole power of such control is now in the legislature; that having once adopted an act they were without power to prevent the legislature from entirely changing their scheme of government. The necessity of the referendum if they would retain the control of local

government is shown by the legislation which has been cited which has been rejected.”

We are therefore of the opinion that the Primary Law recently passed does not affect the Nonpartisan Aldermanic Act, and that the litigation now pending concerning the Primary Act has no bearing on it.

(No. 6132—December 5, 1927—M. H. F.)

1 FRONTAGE CONSENT, WITHDRAWAL, FILLING STATION.

The signature to a consent petition may be withdrawn at any time before a permit has been issued.

2 FRONTAGE CONSENT, JOINT TENANT, WITHDRAWAL OR REVOCATION.

A joint tenant or a tenant in common may withdraw his signature from a consent petition to the same extent that he may sign the petition.

3 FRONTAGE CONSENT, AFFIDAVIT, VENUE.

The venue appearing in the notarial seal is sufficiently stated in an affidavit for the withdrawal of a signature to a frontage consent.

Hon. E. A. Maloney, Deputy Fire Commissioner:

Your communication of recent date, referring to an application to install a gasoline filling station at 3556 West North Avenue, has been referred to the writer for reply.

You state that the application has been approved as conforming to the Zoning Ordinance; that since the filing of the application certain of the consenting property owners have filed with you affidavits in which they request that their names be withdrawn from the consent petition.

The permit has not as yet been issued, and you ask the Corporation Counsel to advise you whether, under the circumstances as stated in your letter it should issue.

For the purposes of this opinion it seems necessary that we advise you only upon the law, leaving to you the matter of checking the frontage consents, the withdrawals or revocations, and determination of the question of fact whether the petition is now supported by sufficient unrevoked frontage consents to warrant you in issuing the permit.

The law is well settled—and we have frequently so advised your office—that the signing of a petition is not an irrevocable act and that frontage consents may be withdrawn at any time before the permit is issued.

You call attention to the fact that certain affidavits of property owners, used to withdraw their consents, are subscribed and sworn to before notaries public and bear the signatures and notarial seals of Cook County notaries, but that these affidavits do not have a venue stated thereon other than in and by the notarial seals. This we regard as a minor defect and not sufficient to warrant you in disregarding said affidavits as revocations. The want of a venue does not vitiate an affidavit. 1 Ill. Dig. 164, and cases cited.

You also suggest a question pertaining to a consent signed by husband and wife, owners of property in joint tenancy.

In an opinion rendered to the Superintendent of Maps by this office October 27, 1913 (Opinions of the Corporation Counsel, January 1, 1913, to October 5, 1914, pages 503, 506), involving frontage consents, it was said:

“If * * * the question of whether the object to be attained by the petition is desirable and beneficial or prejudicial and detrimental, is to be determined by the views and wishes of the greater number of those who are interested in the subject-matter of the petition, the signature of each joint tenant to a petition must be considered to the extent of his interest in the property. In the absence of any proof to the

contrary, the shares or interests of joint tenants are presumed to be equal. See 23 Cyc. 490.

"We are of the opinion that each co-tenant, whether the title appears of record as a joint tenancy or a tenancy in common, should be regarded as a qualified petitioner for his proportionate interest in the property."

It would seem to follow, as one joint tenant may consent and have his proportionate interest recorded, so he may revoke and withdraw his proportionate interest.

With what we have said regarding the law governing this matter, we believe you will be enabled to take the proper action upon the application in question, issuing a permit if the necessary frontage consents are now on file and in force and all other prerequisites are present, or refusing the permit if the application is not now thus properly supported.

(No. 6133—December 12, 1927—M. H. F.)

1 FILLING STATION, PERMIT, REFUSAL.

A permit to install a filling station should be refused where some of the frontage consents submitted are given in violation of the law, although no protest has been received at the time of issuing the permit.

2 FRONTAGE CONSENT, PERMIT, REVOCATION.

A permit issued upon frontage consents of which some were illegally given should be revoked where the remaining consents are insufficient in amount of property represented to meet ordinance requirements, although the permit has been issued in pursuance to an order of the City Council.

3 FRONTAGE CONSENT, BOARD OF EDUCATION, FILLING STATION.

The business manager or agent of the Board of Education has neither power nor authority to consent to the installation of a filling station within 300 feet of school property; and if such a consent has been given, it has no force or effect.

Hon. A. W. Goodrich, Fire Commissioner:

Your communication of recent date, relating to gasoline filling station at 1555-57 Washburne avenue, has been referred to the undersigned for reply.

You state that application to install tanks was filed in your office on or about August 10, 1927; that an inspection of the proposed site showed that the plot of ground was less than 300 feet from the nearest boundary of land used by a school; that a majority of frontage in feet was also filed upon which appears the name "Board of Education by John E. Byrne, Business Manager," for which a credit of 254 feet was allowed, as shown by a report by the Superintendent of Maps; that on November 2, 1927, a Council Order was passed to issue a permit, provided the required consents were on file in the Bureau of Fire Prevention; and, no protest being received by your office against the station, you issued a permit to install the tanks in accordance with the application.

With your communication is transmitted a copy of a written protest against the installation of the tanks. You request our opinion as to whether—

(1) In view of the fact that no protests were received, you were right in issuing the permit.

(2) It is your duty to comply with orders of the kind mentioned passed by the City Council, or are you obligated to follow the general ordinance.

(3) You have the right to revoke the permit, in accordance with the prayer of the protest communication, upon the ground that the permit was illegally issued in violation of section 2279 of the Municipal Code of 1922, notwithstanding the above mentioned Council Order.

We have examined the Journal of the Proceedings of the City Council for November 2, 1927, and find therein recorded on page 1289 the following Council Order:

"Ordered, That the Fire Commissioner be and he is hereby authorized and directed to issue a permit for tanks for a filling station at the southeast corner of Washburne and South Ashland avenues, provided

frontage consents are on file in the Bureau of Fire Prevention."

Paragraph 2279 of the Chicago Municipal Code of 1922, as amended, referring to gas filling tanks, reads in part as follows:

"No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 300 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre."

This section is a part of the ordinance on inflammable liquids and one of the City's general ordinances.

The law is well settled that a Council Order will not amend, repeal or suspend a general ordinance. See opinion dated April 22, 1925, Opinions of the Corporation Counsel, 1925-1926, page 40, wherein it is stated:

"In accordance with decisions of our Supreme Court and the consistent rulings of this department heretofore, we are constrained to advise you, as a matter of law, that in determining whether or not to issue a permit for proposed gasoline stations, you must be guided solely by the ordinances of the city.

"Our Supreme Court has repeatedly held that an ordinance of the city cannot be amended, modified, suspended, or repealed by an order, and that, where the terms and provisions of an ordinance and an order are in conflict, the order must give way to the ordinance. 173 Ill. 91; 174 Ill. 439; 203 Ill. 23; 214 Ill. 102; 207 Ill. App. 570."

Making direct reply to your specific questions, our answer to your first question must be "no." It does not appear to us to be material whether or not protests against the station were received by your department, the important consideration not being the sufficiency of frontage consents, but whether the prohibition contained in section

2279 was violated. If the tanks in question are to be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 300 feet of the nearest boundary of any lot or plot of ground used for a school, then their installation is prohibited by the above mentioned ordinance. And, such being the case, it was not proper for a permit to issue authorizing the installation. This is so notwithstanding the fact that necessary frontage consents were filed with you and ascertained to be in due form.

Why the Board of Education by its Business Manager should sign a frontage consent for a gasoline filling station within 300 feet of property used as a school, is not known to us, but the fact that it has so signed cannot, as we view the matter, affect the prohibition contained in the ordinance. The municipality in the lawful exercise of its police power, has seen fit to prohibit by general ordinance the establishment of gasoline filling stations within 300 feet of property used for schools, and no frontage consents, even though supplied in part by the Board of Education, can nullify this prohibition.

What we have already said regarding a Council Order being insufficient to override a general ordinance, answers, we believe, your second question.

In answer to your third specific question, it is our opinion that inasmuch as your permit was issued in contravention of the express prohibition contained in section 2279, that such permit was improperly issued and should now be revoked by your department.

The permit being invalid you have, in our opinion, the right to revoke it. The ordinance prohibiting you from issuing the permit, the applicant, in applying for the permit, must be held to have known you had no power to

grant it. Hence the mere issue of the permit would give no right to the applicant, because you were without authority to issue it. See *J. Burton Company v. Chicago*, 236 Ill. 383.

(No. 6134—December 12, 1927—L. H.)

1 CITY PHYSICIAN, FIRE DEPARTMENT EMPLOYEES.

The City Physician's duties under present ordinances extends to employees in the Fire Department, but not to matters relating to pensions.

2 MUNICIPAL CODE OF 1922.

Section 1794 makes no distinction between employees of the various departments.

Hon. John F. Beseler, M. D., City Physician:

In response to your verbal request for an opinion as to whether the employees of the Fire Department come within the jurisdiction of the City Physician, so that he has functions with respect to that department similar to those which he exercises in other departments of the City government, we submit the following:

The ordinances of the City make no distinction between employees of the various departments. Section 1794 of the Chicago Municipal Code of 1927 reads as follows:

“Said city physician shall, when directed by the proper authorities, visit and examine employees of the city and report the physical conditions found, to the head of the proper department or bureau. He shall also when directed by the proper authorities examine applicants for positions in the service of the city, applicants for pensions or for retirement from official service, and report the physical conditions found to the person or persons directing such examination.”

You will see from the above that there are certain duties incumbent on you which must be performed, in case you are called upon by the proper authorities, in the Fire Department as well as in all other departments. This does not mean, however, that the City Council may not, if it sees fit, provide a doctor or surgeon for special work in the Fire Department or in any other department. It has already made provision for ambulance surgeons who are under the jurisdiction of the Department of Police, and it may do likewise for the Fire Department.

This does not in any way affect the duties of the City Physician or the status of the physician on the pension board. By section 5 of the Firemen's Pension Fund Act of 1917 (Smith-Hurd's Stat., 1927, p. 534) the Board of Trustees of the Firemen's Pension Fund is given authority to employ a physician, but this has to do only with pension matters. It has no relation to the employment of a physician who is under the jurisdiction of the Fire Commissioner, nor to the functions of the City Physician.

Hence, our opinion is that the City Physician is required to function in the Fire Department in the same manner as in all other executive departments of the City government.

(No. 6135—December 13, 1927—F. J. V.)

1 PENAL BONDS AND FORFEITURES, ACTIONS, PRACTICE.

The procedure upon penal bonds and for a forfeited recognizance is not the same. In case of forfeited recognizance, the action is for the penalty alone after the forfeiture has been ordered by the court for failure to appear. In a *quasi* criminal case, the action is for the recovery of the amount prescribed by the bond as penalty and the amount of the unpaid judgment as damages.

2 PENAL BONDS, DECLARATION, REQUISITES.

In a *quasi* criminal action upon a penal bond the declaration should allege all the breaches of the bond and the damages caused thereby so that a judgment may be rendered for the penalty and the damages stated separately.

3 WORDS AND PHRASES.

"*Quasi* criminal cases" are proceedings in which the acts prohibited by law do not constitute either a felony or a misdemeanor, but are punishable by arrest and prosecution to recover a penalty.

4 WORDS AND PHRASES.

A "*qui tam* action" is one which a third person prosecutes in his own behalf to recover a penalty for the violation of a statute.

Hon. Frank Peska, Prosecuting Attorney:

In your communication of the 1st instant, you state that you are taking up the bond forfeitures in the quasi criminal cases and that you would like to hear from the Corporation Counsel before starting to put these cases into judgment. You submit with your letter an opinion directed to your predecessor, together with a form of declaration therein referred to for use in the actions you are about to bring, and you seek our approval thereof, and such suggestions therein as might be deemed proper. We have carefully considered the opinion and inspected the form of declaration. We prefer to render our opinion *de novo*.

Previous to the Statute 8 and 9 William III, in actions on penal bonds, the practice was to render judgment and issue execution for the full amount of the penalty, where

any breach of the condition of the bond was proved. This statute, and similar statutes in the States, have so changed the rule that now the judgment is rendered not alone for the penalty, but for the damages as well, which are alleged and proved, each item of the judgment, penalty and damages, being found and stated in the judgment separately. *Austin v. People ex rel.*, 11 Ill. 452; *Toles v. Cole*, 11 Ill. 563; *Freeman v. People*, 54 Ill. 153; *Parisher et al. v. Waldo*, 72 Ill. 71.

As to the process of satisfying such judgment, the Supreme Court, in *Freeman v. People ex rel.*, *supra*, (p. 154) says:

“And when execution issues, it is for the debt (penalty) and damages, but an endorsement should be made thereon, that the debt will be discharged upon the satisfaction of the amount of the damages, and they, with the costs are all the officer can collect.” See section 35, Practice Act, Smith-Hurd’s Stat., 1923, p. 1585.

By the aforesaid statute, as construed in Illinois, it became necessary to allege and prove all breaches of the bond and damages occasioned thereby for which judgment might be had. *Hibbard v. McKinley*, 28 Ill. 240.

This double finding, of the penalty due for forfeiture of the bond and the actual damages occasioned by the breach thereof, applies, of course, only to the quasi criminal actions, the principal one of which, and the one which most concerns you, is the action for violation of the municipal ordinances. Many acts are prohibited by law which do not constitute crimes, either felony or misdemeanor, and are punishable by arrest and prosecution to recover the penalty prescribed by the law or ordinance for the violation of such prohibition. These are in the nature of criminal proceedings and are, therefore, called quasi criminal.

Another action of this kind is in the *qui tam* action, which a third person may prosecute in his own behalf by right of statute to recover the penalty prescribed by such statute for its violation. Paternity proceedings are another instance of the quasi criminal action. To all of these actions the foregoing forms of procedure and judgment apply.

The purely criminal action is different. There the recovery of the penalty prescribed by the bond alone is involved. In such case, after arrest and bond, where default is made of the condition, usually to appear and abide the action of the court, a record of such default and the order of forfeiture is entered by the court in the pending case, and thereafter the action for the recovery of the penalty of the bond is brought and is based on such bond and record of forfeiture.

It matters not what the form of the recognizance may be, provided it be that required by law at the time. So, in the absence of a statutory requirement that a formal, written recognizance bond be executed and filed, the old (perhaps obsolete) recognizance taken by the court itself in open court and entered of record in the case would be quite as sufficient as the foundation of the action to recover the penalty thereby fixed as any other separately executed and delivered recognizance bond.

The statute governing all these actions is section 50 of the Municipal Court Act (Smith-Hurd's Stat., 1923, sec. 406, p. 641). This statute provides, among other things, that:

"The bail bond in any criminal or *quasi* criminal case shall be payable to the People of the State of Illinois for the use of the parties interested and conditioned for the personal appearance of the person arrested * * * and from day to day thereafter until the final judgment or order of the court, and in default of such personal appearance *in any criminal case*

for the immediate payment of the penalty of said bond, and in any *quasi criminal case* for the immediate payment of any judgment that may be rendered in such case.”

Here the statute clearly marks the distinction between the criminal and the *quasi criminal* actions. In the criminal case the action is to recover the penalty of the bond forfeited by failure to appear when such forfeiture has been found and ordered of record by the court; in the *quasi criminal* case the action is for the recovery of the judgment rendered in the case and now due by reason of the breach of the bond on failure to pay the judgment. In the criminal case, an order of forfeiture is entered for failure to appear; in the *quasi criminal* case, there is no such forfeiture, but the case proceeds to judgment as on default, but whether such judgment is upon default or upon appearance and trial, the action is on the bond to collect the unpaid judgment, and the form of the judgment entry must be that there is due as penalty the amount prescribed by the bond and as damages the amount of the judgment.

That only the judgment may be recovered in the *quasi criminal* action and not the penalty as in the criminal action is further established by the following proviso of said section 50, *supra*:

“Provided, that in *quasi criminal* cases where the defendant does not appear as aforesaid, the judgment, if rendered against him, and the costs shall be deducted from such cash deposit (in lieu of bond) and the balance returned to the person depositing same.”

We call attention to the final provision of this section of the Municipal Court Act, viz.:

“Other proceedings for the forfeiture of recognizances and bail bonds in criminal and *quasi criminal* cases shall be the same, as near as may be, as

provided for the forfeiture of recognizances and bail bonds in criminal cases in the Criminal Court of Cook County."

The statute referred to here is the Practice Act, section 35, Smith-Hurd's Stat. 1923, p. 1585. Its provisions support what we have said about actions, procedure and form.

Prior to the passage of the Municipal Court Act, adopted November 7, 1905, the action was brought in the corporate name of the City. In view of the provision of section 50, *supra*, of that Act that "the bail bond in any criminal or *quasi* criminal case shall be payable to the People of the State of Illinois for the use of the parties interested," we are of the opinion that the action now should be brought in the name of the People of the State of Illinois for the use of the City of Chicago, a municipal corporation.

The form of the action is that of debt and is governed by the rules of procedure in civil cases—*Town of Partridge v. Snyder*, 78 Ill. 519; *Town of Havana v. Biggs*, 58 Ill. 483.

Various approved forms are to be found for use in these respective actions. We have indicated on the form of declaration submitted certain amendments to be made. This general form, with certain changes to adapt it to the respective case, may be used in the actions on the penal bonds given in *quasi* criminal cases.

(No. 6136—December 15, 1927—L. H.)

ANTICIPATION WARRANTS, EDUCATIONAL LEVY.

Anticipation warrants may be issued against the educational levy of any particular year up to 75 per cent of the levy made by the City Council, the same as in case of a corporate levy.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter of the 12th instant, asking to be advised whether you would be authorized to issue additional tax anticipation warrants against the educational levy for the year 1927, in case the Board of Education makes demand on the City Council, and the City Council acts thereon in due form.

You show by your letter that the educational levy for the year 1927 was \$48,000,000.00; that tax warrants issued to date amount to \$23,500,000.00; that you are about to issue \$3,600,000.00 additional warrants within the next week and that it is now the desire of the Board of Education to issue \$2,600,000.00 worth more. This would bring the total amount of tax anticipation warrants issued and to be issued against the educational levy up to \$29,700,000.00.

This department has repeatedly held in various opinions relating to tax anticipation warrants issued against the corporate levy of the City of Chicago, that they may lawfully issue up to 75% of the levy made by the City Council (see Opinions, 1914, p. 1035; 1916, *id.* p. 196; 1919, *id.* p. 259). While such warrants for the expenses of the Board of Education are issued under a different statute, nevertheless the same rule prevails. Section 132 of the School Act (Cahill's Stat., 1927, p. 2279) requires the City Council, upon request of the Board of Education, to order such warrants to issue "to the extent of seventy-five per cent of the total amount of the tax levied for such purposes."

Therefore, under our interpretation of the law you would have the right to issue tax anticipation warrants in excess of the amount requested.

In this connection you have probably already noted that the levy, if based on the assessed valuations for 1926, would produce upwards of \$37,600,000.00 subject to such reduction as loss and cost might entail. Consequently the warrants would be amply protected, even if there were no increase in assessed values for the year 1927. While we are in no position to state definitely how much of an increase there will be in assessed value of property in the City for the current year, nevertheless the work of the assessing bodies has gone far enough to indicate that there will be a substantial addition to last year's assessment.

(No. 6137—December 15, 1927—M. H. F.)

VEHICLE LICENSE FEE, CONSUL'S EXEMPTION.

A vehicle license to a consul without the usual fee must be based upon a treaty agreement between the United States and the foreign nation exempting consular representatives from the payment of the tax or fee.

Hon. Morris Eller, City Collector:

By your communication of recent date you have asked us to advise you whether you are authorized to issue a 1928 Chicago vehicle license to the Cuban Vice-Consul without the payment of the usual license fee.

On December 15, 1926 this office addressed to the Hon. Angel Perez, Cuban Vice-Consul, a communication, copy of which is enclosed herewith. Based upon this communication it is our opinion that you are authorized to issue to this Consul, free of charge, 1928 license, as was done by you in the previous year. I assume that when you issued

the free license to Vice-Consul Perez last year that you first received from him evidence of the existence of a treaty agreement between the United States and Cuba exempting Consular representatives from the payment of this tax.

(No. 6138,—December 17, 1927—M. H. F.)

1 CIGARETTE GUNS, SALE NOT PROHIBITED.

The exhibition and sale of cigarette guns are not prohibited under existing ordinances.

2 MUNICIPAL CODE OF 1922.

Sections 1265 to 1272 of the Municipal Code of 1922 do not cover cigarette guns.

3 WORDS AND PHRASES.

A "cigarette gun" has the appearance of a 25 caliber Browning automatic pistol and is used for shooting cigarettes or screw cap bottles.

Hon. Michael Hughes, Superintendent of Police:

Your communication of recent date, regarding display and sale of so-called "cigarette guns," has been referred to the writer for reply.

You quote from a letter addressed to you by Judge Francis B. Allegretti, of the Municipal Court of Chicago, which calls attention to several cases of attempted robbery in which the perpetrators used "cigarette guns" to intimidate their victims. A sample of the "gun" is forwarded with your communication, and you request our opinion as to the legality of exhibiting and selling the article.

In size and appearance this article simulates very closely a 25 calibre Browning patent automatic pistol. It is cast in one solid piece of metal and enameled in sinister dull black. The average person, being confronted with it

in the hands of another person, could not tell it from a real automatic pistol. It is only after the trigger is pulled and a portion of the barrel springs upward that it can be seen to be a receptacle for cigarettes or screw cap bottles.

We have examined the statutes of the State and the City Code without finding any provision under which we think you would be justified in restricting the sale of this article or prohibiting its display for sale. Sections 1265 to 1272, inclusive, of the City's general ordinances relating to Firearms and Weapons cover the matter of license to sell, etc., report of sales and display of toy firearms, or toys in the nature of firearms in which any explosive substance can be used. It is not believed that you could accomplish the desired results under this ordinance for the reason that the so-called "cigarette gun" would not fall within the description "toy pistol, or other toy firearm, or toy in the nature of a firearm in which any explosive substance can be used." And we doubt that you could accomplish results under the other provisions of the Firearms and Weapons Ordinance, inasmuch as the article in question is not a firearm, pistol, revolver or other dangerous or deadly weapon of like character.

Our conclusions are supported by the opinion of this office given the Superintendent of Police March 10, 1927. (Opinions of the Corporation Counsel, Vol. XV, page 677.) The article then under consideration was a toy gun, distributed by Hibbard, Spencer, Bartlett & Company, which was constructed in general imitation of a firearm and was some two feet in length, with stock, trigger, trigger guard, hammer, and two metallic barrels. By means of a spring released by the trigger it propelled a wooden ball about the size of a small marble to a distance of several yards, but in this "gun" no explosive substance could be used.

The attention of the Corporation Counsel was at that time invited to newspaper accounts concerning the use of toy guns and pistols in the commission of crime. The conclusion reached was that the exhibition and sale of that article was not contrary to existing City ordinances. A copy of the opinion was forwarded to the Committee on Judiciary of the City Council, to the end that necessary or proper revision of existing ordinances might be given consideration.

A copy of this opinion is likewise being forwarded to such Committee.

(No. 6139—December 17, 1927—L. H.)

1 LICENSE, DISTRIBUTION OF ELECTRICAL ENERGY.

The City has power to license persons who generate or purchase electrical energy for their own purpose and for sale to tenants and others, this power being included in the power to regulate the installation of electrical equipment.

2 STREETS AND ALLEYS, WIRES OR CONDUITS.

Special permission from the City Council is necessary for the purpose of stringing wires or laying conduits across streets and alleys for the transmission of electrical energy in the absence of a general ordinance permitting such a use.

Hon. W. J. Balmer, Commissioner of Public Service:

In your letter of recent date you asked for an opinion as to the power of the City to license persons who generate electrical energy in buildings and use it for their own purposes and for sale to tenants and others; also whether the City could license persons controlling buildings who purchase such energy through a master meter and resell it to tenants.

The Act of the General Assembly, recently passed, which authorizes the City to "regulate the installation, alteration

and use of all electrical equipment," while apparently designed in the first instance to govern installation, seems to be broad enough to permit the City to regulate the use of such electrical equipment after it is installed. Smith-Hurd's Stat., 1927, p. 467; Cahill's Stat. 1927, p. 414.

Prior to the enactment of the statute to which we refer the Supreme Court held that the City had no authority to license electrical contractors or to charge permit fees for the inspection of electrical equipment. Nevertheless, in the case which decided this point the court said:

"It may be admitted that electricity is a dangerous agent, that fires often originate from crossed wires and defective insulation, and that the regulation of electrical construction work and the licensing of electricians is not only salutary but necessary. Regulations of a similar character have been sustained in other jurisdictions." *Arms v. City of Chicago*, 314 Ill. 316.

Following the rendering of this decision the Legislature passed the Act giving the City the power to do what the court indicates should be done, and included in the power the authority to regulate the use of the electrical equipment. It has frequently been held in this State that the power to regulate includes the power to license.

Hence, we are of the opinion that it is within the power of the City to license the persons using the equipment after it is installed for the purpose of furnishing electrical energy. This applies to those who control the equipment even if they purchase the energy and resell it, as well as to those who generate their own energy.

You speak of certain owners of buildings supplying energy to adjoining buildings and crossing streets and alleys for that purpose. In all such cases it will be necessary to secure special grants from the City Council, since there is no general ordinance which permits wires or conduits to cross public streets or alleys.

(No. 6140—December 19, 1927—L. H.)

HARBOR FUND, USE OF, APPROPRIATIONS.

Although limited to the construction of a harbor "only," the Harbor Fund may be used for work done preliminary to such construction, for planning and specifying the details of the construction work, for removal of legal obstacles, for proper accounting of the Fund, and for the ultimate use by lease or otherwise of the land that is made, and for other things.

Hon. John S. Clark, Chairman, Committee on Finance:

We have your letter in which you ask us to advise your Committee as to the nature of expense that may be appropriated for from the so-called Harbor Fund, which is to be derived from a special tax for that purpose.

The Harbor Act of 1913, as amended in 1927, provides in section 3-b (Cahill's Stat., 1927, p. 554) that in addition to all other taxes authorized by law the City is empowered to levy and collect in each of four consecutive years, a tax of one-fourth of one mill on the dollar, and that the proceeds of such additional tax shall be credited to a Harbor Fund for the particular harbor development provided for in that act, "and shall be used for Harbor construction purposes only."

We apprehend that the question you ask has arisen by reason of the limitation placed on the use of this fund, and that you want to know what is meant by "Harbor construction purposes only." We would say from the act itself, without examining any authorities on the subject, that a reasonable construction of its provision would be that this limitation means that the fund so provided can be used for actual construction work, and for all necessary preliminary work, including the drafting of plans, the legal work connected therewith, the work of accounting for the

fund, etc. This interpretation is not only reasonable, but we find ample authority for it by arguing from analogy.

In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, a similar question arose with respect to the use of moneys from the Traction Fund. One of the items that was assailed on the ground that it was not proper to appropriate money therefor, was an appropriation in the following words:

“Salary of secretary and expenses for the employment of such legal, engineering and other expert assistants on elevated railroads and street railroads and subways as may be necessary, and for expenses thereof, and for printing, postage and supplies, \$25,000.”

The ordinance under which the Traction Fund was accumulated provided for the deposit of moneys in a separate fund “to be kept and used for the purchase and construction of street railways by said City.” It was charged in the bill that the City was without power to appropriate for such preliminary work, and that the appropriation was illegal and a misappropriation of public funds. The Supreme Court, in passing on this point, at page 612, said:

“The appropriations made by the city are not for the purpose of purchasing or constructing subways, but only for the purpose of doing necessary preliminary work which will enable the city to determine whether it is advisable to proceed with the construction of such subways under the existing ordinances of the city. The traction companies cannot be compelled to contribute to the cost of such subways until an ordinance is passed by the city council describing in detail the character of subways to be constructed and the plans and specifications are approved by the board of supervising engineers. The power to construct necessarily includes the power to take the preliminary steps contemplated by the appropriation ordinance in question.”

By the same process of reasoning it may be said with respect to the construction of a harbor, that there must be preliminary work done, not only for the purpose of planning and specifying the details of the construction work, but also to remove legal obstacles, to provide for proper accounting of the fund, to provide for the ultimate use, by lease or otherwise, of the land that is made, and for other things.

We are not able at this time to foresee all the items of expense that might arise in connection with this work, but believe that we have indicated to what extent the Harbor Fund may be used without going beyond the strict limits of the Act authorizing the creation of the fund.

(No. 6141—December 19, 1927—L. H.)

1 APPROPRIATIONS, VEHICLE TAX FUND.

The items for street and warning traffic signs as well as general street repairs such as rounding off curbs at street intersections, moving poles, lights, inlets and catch basins and repairing may be properly defrayed from the vehicle tax fund.

2 WORDS AND PHRASES.

The word "only" in clause 96, section 1, article 5 of the Cities and Villages Act, is a limitation placed generally on the use of the fund and was not intended to put a narrow construction upon the words "improvement or repair."

3 WORDS AND PHRASES.

"Repair and improvement" in clause 96, section 1, article 5 of the Cities and Villages Act are not to be narrowly construed but include any street improvement which benefits the general public.

Hon. John S. Clark, Chairman, Committee on Finance:

We have your letter of this date in which you call our attention to certain requests made by the Department

of Public Works for appropriations from the Vehicle Tax Fund, and you asked to be advised whether moneys may properly be drawn from that fund for the purposes mentioned.

The particular items that you refer to appear on page 281-A of the Comptroller's estimates. On this page it appears that the Department asked for \$182,000.00 for street and warning traffic signs. The Comptroller reduced this to \$81,000.00. Another item on the same page calls for \$162,582.00 in the departmental estimate and this has been reduced by the Comptroller to \$57,500.00. You further state that the officials of the Bureau of Streets say that the Bureau is called upon to expend considerable money from its general street repair fund under account 281-S for rounding off curbs at street intersections and for incidentals, such as moving poles, lights, inlets, catch-basins and repairing.

We look upon all these matters as belonging to the same class and in the same category. We see no reason why the Vehicle Tax Fund should not be drawn upon for these purposes, since they are legitimate expenses authorized under the law, which permits the levying of license fees for the Vehicle Tax Fund.

The authority to collect these license fees is given to the City under the 96th clause of section 1, article V of the Cities and Villages Act. This reads as follows:

“To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair.”

You will observe from the wording of the statute that the moneys in the fund are to be used for paying the cost

and expenses of street or alley improvement or repair. It is true the word "only" is used, but that is a limitation which is placed generally on the use of the fund and is not intended to imply a narrow construction of the words "improvement or repair."

A street improvement in its entirety may be paid for out of this Vehicle Traffic Fund, if it is of such a nature that the public generally derives the benefit from it and it does not have the effect of enhancing the value of property in a circumscribed district. It would be just as reasonable to assume that there was some narrow meaning to be placed upon the word "repair" as to assume that the word "improvement" is so limited that it will not include such items as it is proposed to make appropriation for as above.

In the case of *McGovern v. City of Chicago*, 281 Ill. 264, it was held that a blanket appropriation setting up the entire Vehicle Tax Fund for repairs of streets, without specifying any amount, was a valid appropriation of this fund. Under such an appropriation there is practically no limitation placed on the kind of repairs to be made on the streets to be paid for out of such fund.

We have been called upon at different times to state whether the installation of street and warning traffic signs was a proper expense chargeable to the improvement of a street, and I have always held that it was part of the street improvement. (See opinion of October 21, 1927, holding that safety islands and traffic signals were parts of local improvements). What we say of the traffic signs is even more emphatically true of such construction and betterments as may be necessary on the streets, and especially such as are specifically mentioned above, which are designed to make the street safer and more easily susceptible to travel. It must be borne in mind that automobile traffic has wrought changes that must be taken

care of and it undoubtedly was the intention of the Legislature in giving the broad powers with respect to the Vehicle Traffic Fund, that there should be the means of doing so through a fund collected from those that are especially benefited by the improvement, namely the persons who use the streets.

We are, therefore, of the opinion that the different items for which appropriations are asked, may properly be defrayed from the Vehicle Tax Fund.

(No. 6142—December 28, 1927—G. F. M.)

1 PENSIONS, TIME BETWEEN DISCHARGE AND REINSTATEMENT, RIGHT TO CREDIT.

A police officer or any other Civil Service employee who has been unlawfully discharged and reinstated is entitled to a full pension credit for the period between the date of his discharge to the date of reinstatement upon presentation of an order of reinstatement and the payment of a proper amount into the pension fund.

2 CIVIL SERVICE, UNLAWFUL DISCHARGE.

An unlawful discharge is no legal separation from Civil Service.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of William Bergan, Sergeant of Police, to be credited for pension purposes with the period of time he was unlawfully excluded from the department, the following is submitted:

According to the information submitted, Sergeant William Bergan was discharged on August 7, 1912, and was reinstated by an order of court on August 16, 1916, the court finding that he had been unlawfully discharged.

An unlawful discharge is not a legal separation from the service and does not operate to deprive the person discharged of any of his pension service credits as a member of the department from which he was unlawfully discharged, so far as the time he was excluded is concerned.

To avoid any question as to the right of a policeman to be paid a pension for any period of time during which he did not contribute to the pension fund, and to the end that the accumulation to the credit of a policeman for pension or annuity purposes may be in equal amount with those of other men in the same rank, we have heretofore held that a policeman in the position of Sergeant Bergan should pay into the pension fund a sum of money equal to the amount which would be to his credit in the fund had he been in actual service and the required deductions had been regularly made from his salary during the entire period he was unlawfully excluded.

Upon presentation of a certified copy of the court order restoring Sergeant Bergan to the department and upon the payment into your fund of the amount as hereinabove set out, I am of the opinion that Sergeant Bergan should be given full credit for the period from August 7, 1912, to August 16, 1916, to the same effect, for pension purposes, as though he had been in active service in the police department.

(No. 6143—December 28, 1927—L. H.)

1 SUBWAYS ETC., SPECIAL ASSESSMENT OR TAX.

In case of sewers, subways and viaducts, section 42 of the Local Improvement Act authorizes their construction with funds derived from special assessments or special taxes which assessments or taxes may be divided into twenty equal installments, except the first installment if it comes to a fractional amount. These assessments or taxes, under section 42a of the same Act may cover payment for the property taken and condemned as well as for the work of construction.

2 SUBWAYS, CONSTRUCTION.

The right or power of a City to build subways is derived from clauses 13 and 28 of section 1 of article 5 of the Cities and Villages Act as well as from the Local Improvement Act.

Hon. William Hale Thompson, Mayor:

Replying to your request for advice concerning the law governing the spreading of special assessments over a period of twenty years to defray the cost of subway construction, we submit the following:

The source of the power to make local improvements and to assess property specially benefited thereby is contained in section 9 of article IX of the Constitution, which reads in part as follows:

“The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise.”
Cahill’s Stat., 1927, p. 22.

In pursuance of the authority thus defined, the General Assembly passed the Local Improvement Act. This Act authorizes the making of local improvements by special assessment or special taxation on contiguous property, but does not define a local improvement. The Legislature probably intended that there should be sufficient elasticity in

the term so that a municipality may not be unduly hampered. In 1903 the Legislature amended section 42 of this Act, which now contains the following provision for the payment of special assessments in installments and the spreading of same over a period of years:

“It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against (the) municipality on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: Provided, however, that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. In all cases such division shall be made so that all installments shall be equal in amount, except that all fractional amounts shall be added to the first installment, so as to leave the remaining installments of the aggregate equal in amount and each a multiple of one hundred dollars (\$100) * * *.”
Cahill’s Stat., 1927, p. 332.

The constitutionality of the above provision is firmly established. The City has been operating in accordance with it for many years, but has not ordinarily spread an assessment over a longer period than five years. The mere fact that it has not availed itself of the authority to divide the assessments into ten or twenty installments will not prevent it from resorting thereto when occasion may justify it.

Under the section of the statute above quoted the limit of time for the payment of a local improvement for any other purpose except the building of sewers, subways or viaducts is ten years, while the installments to be paid either by the City or by the property owners in the case

of sewers, subways and viaducts may be spread over twenty years.

More recently, by the passage of an Act inserting section 42a in the Local Improvement Act, the provision for paying for such an improvement by installments was extended to cover cases where property is condemned for the purposes of the improvement as well as for the construction work. The portion of said section 42a which authorizes this reads as follows:

“Whenever an ordinance provides for the making of a local improvement which comprises both the construction of an improvement and the taking or damaging of property therefor, and proceedings have heretofore been or shall hereafter be instituted under this Act for the confirmation of a special assessment or a special tax to defray the whole or any portion of the cost of such improvement, including the cost of the construction thereof and the compensation for the taking or damaging of property therefor, it shall be lawful to provide by the ordinance for such local improvement or by an ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed and each individual assessment and also the assessment against the municipality on account of property owned by the municipality and for public benefits, be divided into installments not more than ten (10) in number: Provided, however, that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. So much of the aggregate amount assessed as represents the cost of the construction of the improvement shall be divided into as many parts as there are installments, which parts shall be equal in amount and each a multiple of one hundred dollars, except that any fractional amounts of such cost of construction after division as aforesaid shall be apportioned to the first installment; so much of the aggregate amount assessed as represents the compensation for property to be taken or damaged, together with the cost of making and collecting the special assessment

or special tax (in the case of such municipalities as may lawfully include such cost in special assessment or special tax proceedings) shall be apportioned to the first installment of the special assessment or special tax. * * *” Cahill’s Stat., 1927, p. 333.

The power of the City to construct subways is contained in section 1 of article V of the Cities and Villages Act, more particularly by clauses 13 and 28. The authority to build a subway under the Local Improvement Act has been considered by the Corporation Counsel on numerous occasions. Among the opinions rendered (all holding that this is proper) are the following: Opinion of former Corporation Counsel Major Edgar Bronson Tolman, June 30, 1902; opinion of Assistant Corporation Counsel Eugene H. Dupee and Harry F. Atwood, November 17, 1915; opinion of Assistant Corporation Counsel Ralph I. Crandall, February 11, 1923; memorandum brief, entitled “To What Extent Can the Local Improvement Act be Advantageously Used for the Building of Subways,” by William H. Sexton, former Corporation Counsel, dated November 27, 1923; opinion of Francis X. Busch, Corporation Counsel, February 16, 1924.

We believe the above covers all points concerning which our opinion has been asked at this time.

(No. 6144—December 29, 1927—L. H.)

1. NEWSPAPER STANDS, SALE OF PUBLICATIONS OTHER THAN NEWSPAPERS.

A publication printed in a foreign language which does not purport to be a newspaper cannot be sold from newspaper stands on public streets in view of section 3739 of the Municipal Code of 1922 which restricts the use of stands to newspapers alone.

2. MUNICIPAL CODE OF 1922.

Section 3739 giving permission to sell newspapers from news stands on public streets may be sustained under the police power of the City.

Hon. Michael Hughes, Superintendent of Police:

You forwarded to us copies of two issues of a publication known as "Bicz Bozy," printed in the Polish language, with a request for an opinion as to whether or not there exists any right to sell the same from the newspaper stands on the public streets.

The publication in question consists of 16 pages approximately $8\frac{3}{4}$ x $11\frac{1}{2}$ inches in size, bound together with wire staples. It bears no resemblance whatever to a newspaper, and is not printed daily but purports to be a weekly publication. The writer requested parties who understand the Polish language to examine it sufficiently to determine whether or not it contained news matter, and was informed that it does not purport to be a newspaper in any sense of the word as used with reference to publications that give information of current events.

No one has the right to use the public streets for purposes of the sale of merchandise. This rule is relaxed somewhat by virtue of section 3739 of the Chicago Municipal Code of 1922 in favor of daily newspapers printed and published in Chicago. Said section authorizes the Commissioner of Public Works to permit stands to be main-

tained on public streets between the hours of 5 a. m. and 8 p. m. which may be used for the purpose of exhibiting for sale daily newspapers printed and published in the City. The section further provides that nothing shall be exhibited, offered or sold therefrom except such daily papers.

While the law department has never gone on record as saying that section 3739 is a valid ordinance, nevertheless we have stated on numerous occasions that permission to sell daily newspapers from such stands may be within the police powers of the City. We are not called upon in the present instance to discuss the validity of this ordinance because the publication that you have shown us does not come within the classification mentioned in this ordinance; and therefore it is clearly improper and unlawful to sell the publication from such newspaper stands.

(No. 6145—December 30, 1927—L. H.)

DEATH BENEFIT, CHILD 18 AND OVER.

An unmarried daughter who was dependent upon policeman at the time of his death is entitled to death benefits the same as a minor child.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of a letter from the auditor in which he states that a voucher has been submitted covering the sum of \$7,500.00 as death benefits to the dependent of Police Lieutenant John H. Tobin, who died while in the performance of his duty. It is stated in this letter that Lieutenant Tobin was survived by his wife, Mrs. Helen Tobin, and by his daughter, Miss Helen A. Tobin, who is 18 years of age.

No question is raised concerning the propriety of death benefits being awarded, but you ask to be advised whether Helen A. Tobin, the daughter who is 18 years of age, comes within the scope of the statute and ordinance authorizing the City to pay death benefits to the dependents of deceased firemen and policemen.

Under section 1 of the Act of 1921, as amended in 1925 (Cahill's Stat., 1927, p. 431), the payments to be made in a case of this kind to the family or dependents of a policeman shall be for the use and benefit in equal parts to the widow and minor child or children of the deceased. This, however, is followed by a proviso which reads as follows:

“Provided, that a female unmarried child of full age or a male child that is physically or mentally disabled, in case he or she is dependent on the deceased for support at the time of his death, shall be entitled to the use and benefit of such fund in the same manner and to the same degree as a minor child.”

A provision in almost the identical language is contained in section 3132 of the Chicago Municipal Code of 1922 as amended on January 16, 1926, Council Journal, p. 2152.

You will see from the above that an unmarried daughter of a deceased policeman who was dependent upon him at the time of his death is entitled to benefits just the same as a minor child.

Therefore, if Miss Helen A. Tobin can show that she was so dependent, the voucher in question should be honored.

(No. 6146—December 30, 1927—J. W. B.)

PARKING ORDINANCE, EFFECTIVE JANUARY 10, 1928.

The Parking Ordinance of December 14, 1927 (Council Proceedings of 1927, page 1569), being penal in its nature did not take effect until January 10, 1928, or 10 days after the ordinance was published.

Hon. Michael Hughes, Superintendent of Police:

We are in receipt of your request for an opinion advising you as to when the so-called Parking Ordinance passed by the City Council on December 14, 1927, and appearing on page 1569 of the Journal of the Proceedings of the City Council of said date, shall become effective.

In reply, we beg to advise you that the ordinance in question is a penal ordinance, and, under the provisions of paragraph 76, chapter 24, Smith's Stat. 1927, p. 350, publication of the same is required as follows:

"All ordinances of cities and villages imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published. And all other ordinances, orders and resolutions shall take effect from and after their passage, unless otherwise provided therein."

The City has caused the ordinance in question to be published today, and, as the statute expressly provides that such an ordinance shall not take effect until ten days after it is so published, the ordinance referred to in your request will not become effective until January 10, 1928.

(No. 6147—December 31, 1927—M. H. F.)

VEHICLE LICENSE FEE, CONSULAR AGENT, EXEMPTION.

Under a treaty between the United States and a foreign nation exempting consular agents from all taxes, except upon real estate and in case of engaging in a profession, trade or private business, the consular agent is exempted from paying a vehicle license fee upon the assurance that he is not engaged in any profession, business or trade in this country.

Hon. Morris Eller, City Collector:

Your communication of the 30th instant states that Laurence Bungardean, Roumanian Consular General, 360 North Michigan avenue, has made application for a City of Chicago vehicle license for his automobile, which application is accompanied by a letter requesting that such license be issued to him with the fee remitted. His claim to a free license is based upon article III of what purports to be a Consular Treaty between the United States of America and Roumania, which treaty is represented to be in force today. Article III, above mentioned, reads as follows:

“Consuls-general, consuls, vice-consuls and consular agents, citizens of the State by which they are appointed, shall be exempt from preliminary arrest except in the case of offenses which the local legislation qualifies as crimes and punishes as such; they shall be exempt from military billetings, from service in the regular army or navy, in the militia, or in the national guard; they shall likewise be exempt from all direct taxes, national, state or municipal, imposed upon persons, either in the nature of capitation tax or in respect to their property, unless such taxes become due on account of the possession of real estate, or for interest on capital invested in the country where the said officers exercise their functions.

“This exemption shall not, however, apply to consuls-general, consuls, vice-consuls, or consular agents engaged in any profession, business or trade, but the

said officers shall in such case be subject to the payment of the same taxes that would be paid by any other foreigner under the like circumstances.

"It is understood that the respective consuls, if they are merchants, shall be entirely submitted, as far as concerns preliminary arrest for commercial acts, to the legislation of the country in which they exercise their functions."

Mr. Bungardean assures us that he is a citizen of Roumania and is not engaged in any profession, business or trade in this country, such as would cause him to come within the second paragraph of said article.

We are, therefore, of opinion that he is exempt from the payment of the vehicle license fee. The City's vehicle ordinance imposes a tax which we believe comes within the terms of the exemption provided for in the above quoted treaty article.

This opinion is in accord with the opinion given by this department to your office, January 3, 1924, in the matter of vehicle license for the Serbian Consul, where the same language found in the treaty between the United States and the Serbian government was considered. See Opinions of the Corporation Counsel, April 16, 1923, to April 15, 1924, page 646.

(No. 6148—January 4, 1928—L. H.)

1 LOCAL IMPROVEMENT BONDS, ANNEXED VILLAGE, CUSTODY.

Local improvement bonds issued by a village whose territory has been annexed to the City of Chicago which bonds have not been delivered to the contractors should be received by the Comptroller and cancelled or destroyed by him upon the issuance of new securities by the Board of Local Improvements.

2 COMPTROLLER, ANNEXED TERRITORY.

Upon the annexation to the City of Chicago of another municipality's territory, the Comptroller, under section 27 of the Municipal Code of 1922 takes over the books, papers and documents of the annexed municipality and distributes them to the proper departments.

Hon. Charles C. Fitzmorris, City Comptroller:

You referred to this department a letter from the former village treasurer of the Village of Mount Greenwood containing a list of local improvement bonds, to which was attached a receipt for said bonds which you were asked to sign. You ask whether it is proper for you to accept the bonds and receipt for same.

The letter of the village treasurer states that the bonds, of which there appear to be about ninety, were printed in pursuance of the Village's Special Assessment No. 12; that they were prepared for delivery to the contractor; that the annexation makes it necessary to pay the contractor with City of Chicago vouchers or bonds; that upon such payment the Village of Mount Greenwood bonds may be destroyed; and the treasurer requests that you sign his receipt and send it to him. You say that the bonds have been presented at your office on numerous occasions, but you have refused to accept them unless authorized by the Board of Local Improvements either by letter or in the form of new vouchers.

We do not believe that the acceptance of these bonds and the delivery of a receipt for same would have any legal significance whatever. If the matter had proceeded so far that the bonds were in the hands of the contractor, then the obligation arising thereunder would be one that the City would carry out through the collection of the special assessments and the payment of the moneys received. Since they still remain on hand, however, the proper procedure will be to issue new securities in lieu thereof. If that is done, the acceptance and subsequent cancellation of these bonds is only a means of heading off future complications in case the bonds get into the hands of parties who may hold them for years and then attempt to collect on them. When such things happen they are often confusing to new officers of the City. Such officers would not know how the bonds got out and they might assume that some obligation on the part of the City exists with relation thereto.

Under section 14 of the Annexation Act of 1889 (Ca-hill's Stat., 1927, p. 389) all public books, papers and documents of the village must be transferred to such appropriate officer of the City as the City Council may direct. By section 27 of the Chicago Municipal Code of 1922 the Comptroller is designated as the officer of the City who has charge of and supervision over such books, papers, documents, and other property. It is for this reason that the comptroller always takes over the books, papers, documents and property of an annexed municipality and then distributes them to the proper departments.

We, therefore, recommend that you take over these bonds as a step in the annexation proceedings, adjust the matter through the issuance of new securities by the Board of Local Improvements, and then cancel or destroy the bonds of the village.

(No. 6149—January 5, 1928—L. H.)

CONTRACTS, WORKMEN'S COMPENSATION INSURANCE.

The expense of securing workmen's compensation insurance must be borne by a contractor who makes no specific arrangements or provision for its payment and cannot be charged to the City.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter of recent date concerning charge made by a contractor for workmen's compensation insurance. You state that this is the first bill of this kind that has been presented, and asked to be advised whether it should be allowed.

The City makes a practice of requiring persons who contract with it to insure their employees under the Workmen's Compensation Act. This is done in order to avoid claims for damage in case of injury while engaged on the City's work. It is customary for the contractor to bear this expense, and the contractor would have no recourse whatever against the City if he secured the work by competitive bidding and made no specific arrangements for payment.

This is true even though under a contract whereby workmen of the contractor are paid a fixed stipend by the City and the City is to pay extra for the material used the question becomes more complicated, because it may be assumed that the contractor will make a charge in some form directly or indirectly for this expense.

We know of no justification for such extra charge in addition to the fixed items agreed upon, however. The contractor is supposed to treat this expense in the same manner as he treats all other expenses. It would seem to us that the contractor would be as well entitled to make a charge for the rent of his office or for the account-

ing necessary to keep track of the work as for the insurance of his employees.

We, therefore, beg to advise you that the charge is an improper one and should not be allowed.

(No. 6150—January 9, 1928—L. H.)

BANK DEPOSITARIES, BONDS, APPROVAL.

The City Council may accept bids and name banks as depositaries before bonds are submitted but the award does not become effective and the Comptroller must withhold deposits until bonds for proper amounts are tendered and approved.

Hon. Charles C. Fitzmorris, City Comptroller:

We are in receipt of your letter of recent date in which you state that two of the depositary banks of the City for the year 1927 which submitted bids for 1928, failed to present their bonds in time to have them approved by the City Council at the time the bonds of the other depositaries were approved. You ask for advice concerning the situation that confronts you in regard to these two institutions.

The two banks you speak of are the Franklin Trust & Savings Bank which furnished an incomplete bond by reason of some official being absent from the City, and the West Central State Bank which submitted a Surety Company bond for \$30,000.00 while it had \$55,000.00 on deposit. The Franklin Trust & Savings Bank has \$150,000.00 on deposit. Both of these banks were named as depositaries by the ordinance that was passed on December 28, 1927, Council Journal, pages 1576-1579.

It is entirely proper for the City to name banks as depositaries before the bonds are submitted. Section 29

of the Chicago Municipal Code of 1922 permits you to present the bids to the City Council before the bond is given, but expressly says that no money shall be deposited in any bank, nor the award become effective until the bank has been designated as depositary and shall have delivered to the Comptroller, an indemnifying bond in an amount equal to the amount which the City Council decides the bank is entitled to receive on its bid. Your understanding of the law to the effect that you cannot submit a bond for a less amount than the amount bid is therefore correct, and you properly withheld the bonds of these two institutions when you submitted the other bonds.

No harm is done these banks up to the present time, but it will be necessary to have their bonds approved by the City Council forthwith if they are to retain the money now on deposit in those banks. While the sureties on their bonds for the year 1927 are bound to make good in case the money is not withdrawn until after the first of January, 1928, nevertheless, the law does not contemplate that you should continue to leave the money with them indefinitely if they have not qualified for the year 1928.

Your proper course is to do one of two things; either withdraw the money from these institutions or send word to them and their sureties at once that their bonds will have to be submitted forthwith, and approved by the City Council if the money of the City is to remain in the banks.

(No. 6151—January 9, 1928—L. H.)

TAXATION, MUNICIPAL PROPERTY, EXEMPTION.

City owned property located in adjoining towns and used for water supply purposes is exempt in Illinois under express constitutional and statutory provision.

Hon. Francis D. McManus, Law Department, City of Providence, R. I.:

Your letter to the Corporation Counsel concerning taxation of City owned property located in adjoining towns and used for water supply purposes, was referred to the undersigned for consideration and reply.

You state that your investigation of the authorities indicates to you that such property is not taxable unless made so by legislative enactment. You state further that you are interested in knowing whether the City of Chicago pays such a tax and whether we pay it because of some statute enacted by the Legislature requiring us to do it in order that the adjoining towns may receive revenue which would otherwise come to them if the property were owned by private parties instead of a municipality.

As we view the situation the Legislature would be able to control the entire subject matter if there were no constitutional limitation on it. In our State there is such a limitation. Section 3 of article IX of the Constitution of 1870 authorizes the Legislature to exempt the property of municipal corporations, both real and personal, from taxation if such exemption is made by general law. We assume that you have access to a copy of the statutes of Illinois, which contain the Constitution of 1870, and that our reference to the section will be sufficient without quoting it.

Under the authority thus given by the Constitution, the Legislature has made certain exemptions which appear in

section 2 of the Revenue Act. This Revenue Act appears in both Cahill's Statute and the Smith-Hurd's Statute as chapter 120. By referring to this section, you will find that there are 10 species of property specifically exempted. Among these 10 will be found several different kinds of property of municipal corporations. The particular clauses which exempt the kind of property that you speak of will be found in the 6th and 9th paragraphs. Under the 6th paragraph "all property owned by any City or Village outside of the corporate limits of same used exclusively for municipal purposes" is exempt, and under the 9th clause "all works, machinery and fixtures belonging exclusively to any town, village or city used exclusively for conveying water to such town, village or city" is exempt.

From these references you will be able to see that the matter is governed by the Constitution in this State, and that the Legislature has acted in so specific a manner that there is little chance of such a question arising as you have before you.

(No. 6152—January 10, 1928—F. J. C.)

1 ZONING, BOARD OF APPEALS, JURISDICTION.

The Board of Appeals is limited by statute to such questions as are brought before it, although the language of the statute is broad enough to cover every question that may be involved on appeal.

2 ZONING, BOARD OF APPEALS, PRIVATE RESTRICTIONS.

The question of private restrictions or covenants running with the "deed" is not involved upon appeal from a permit issued pursuant to the terms and provisions of an ordinance.

*Mrs. Eva Holland Hamilton, Chairman, Board of Appeals,
Zoning:*

In response to your letter of recent date in which you request that an opinion be rendered as to the jurisdiction

of the Board of Appeals over private restrictions or covenants running with the deeds, we desire to say that the power of the Board and the matters over which it has jurisdiction are specifically defined in the statute creating the Board. Section 3 of the statute provides:

“All ordinances passed under the terms of this Act shall be enforced by such officers of the city, or incorporated town as may be designated by ordinance. Regulations by this Act authorized may provide that a Board of Appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with the general or specific rules therein contained.”

It will be seen that the Legislature by the language of the statute made provision for a variation of the regulations fixed in the ordinance. The statute further provides in the same section:

“That such Board of Appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by any administrative official charged with the enforcement of any ordinance adopted pursuant to this Act.

“It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. * * *” See Cahill's Statutes, 1927, chapter 24, par. 523, page 405.

Under the terms of this statute it seems apparent that the power of the Board of Appeals is limited only to such questions as may arise under the general and specific rules laid down in the ordinance having application to the particular question that may be before the Board for consideration. It appears to us that only such questions as are brought before the Board of Appeals by an appeal from the act of an administrative officer can be considered by the Board on the hearing of such appeal. The power is fixed by the statute in the Board of Appeals to

reverse, affirm, wholly or partly, or modify any order, requirement, decision or determination as in its opinion ought to be made in the appeal and for that purpose shall have all the power of the officer from whom the appeal is taken. While this language may seem broad enough to cover every question that may be involved in such appeal, yet there is a limitation fixed on the power of the Board to the extent that only such matters and questions as may arise under the ordinance can be determined by the Board of Appeals.

We make the suggestion that in most cases the appeal is taken from the Building Commissioner, either for the reason that he has or has not issued a permit pursuant to the terms and provisions of the ordinance. If a permit has been issued pursuant to the terms and provisions of the ordinance, then the Board is not required nor is it necessary for it to pass on the questions of private restrictions or covenants running with the deed. The Board can obviate this necessity by simply affirming the decision of the Building Commissioner or other officer without passing on the question as to whether or not the private restrictions or covenants have any application to the matters before it.

It is our opinion that these private restrictions or covenants present a matter of rights between individuals in which the City is not necessarily interested. If the Zoning Ordinance in its terms upholds the decision of the Building Commissioner or in its terms prohibits the action of the Building Commissioner, the matter may be decided by the Board solely on these questions as they are presented under the ordinance.

To take into consideration any rights involved in private restrictions would be an assumption of power which, we think, is vested wholly in a court.

(No. 6153—January 12, 1928—G. F. M.)

PENSION, RESTORATION, DIVORCE.

A pension which had ceased and determined upon re-marriage cannot under present statute be revived or restored by divorce.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a policeman's widow to again be paid a pension after she has remarried and had been divorced subsequent to the original grant of a pension to her, the following is submitted:

Your letter states that Mrs. Anna D. Streeter was awarded a pension of \$50.00 a month in 1918 following the death of her husband, Henry R. Streeter, on May 21, 1921, of that year; that on March 3, 1924, she informed you that she had married Richard N. Tarkington in February, 1924; that her name was stricken from the roll as of March 1, 1924; that she was divorced from Tarkington on June 1, 1927, with the restoration of her former name of Anna Streeter.

Section 50 of the Act of 1921 provides that widows who are or who shall become pensioners under the Police Pension Fund Act of 1915 as amended, shall have a right to receive pensions in accordance with the provision of the Act of 1915 and that the Retirement Board shall allow such pensions in accordance with the provisions of that Act.

Section 6 of the Police Pension Fund Act of 1915, as amended in 1917, contains the following provision:

"In case the widow of any policeman pensioned hereunder shall marry, the pension heretofore granted her shall at once cease and determine."

There is no provision in either the Act of 1921, or in the Act of 1915 as amended that gives to your Honorable Body the right or power to revive or restore a pension which has once ceased and determined under the law. Neither is there any provision in either one of the Acts to the effect that when the widow of a policeman remarries and subsequently becomes divorced, that she shall again become entitled to a pension as the widow of a policeman.

I am of the opinion that Mrs. Streeter is not now entitled to be paid a pension.

(No. 6154—January 13, 1928—M. H. F.)

ALIENS, EMPLOYMENT, ORDINANCE PROHIBITING.

The employment of aliens upon public works or improvements is not prohibited by ordinance; nor can an ordinance requiring the employment of native born or natural citizens alone by public officers be upheld as valid legislation.

Dr. H. F. Simon, German Consul General, 646 N. Michigan Blvd., Chicago, Illinois:

This department is in receipt of your communication of recent date in which you ask to be informed whether there is any ordinance of the City of Chicago which prohibits aliens from being employed on public works of the City.

Please be advised that our examination of the City's general ordinances discloses no such existing ordinance.

There is, however, a Civil Service Law of the State of Illinois, adopted by the City of Chicago, which has a bearing upon the subject matter of your inquiry. This statute is entitled, "An Act to regulate the Civil Service of Cities," approved March 20, 1895, and may be found

included in paragraphs 39 to 77 inclusive, of chapter 24½, Smith-Hurd's Statutes of Illinois, 1927. This statute authorizes the Civil Service Commission, appointed by the Mayor, to classify all the offices and places of employment in the City with reference to examinations, to make rules to carry out the purposes of the Act and for examinations, appointments and removals. The Act further provides (section 6) as follows:

"All applicants for offices or places in said classified service, except those mentioned in section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character."

Among the rules adopted by the Commission is section 2 of Rule X, which provides as follows:

"Applicants for places as laborers shall file applications on forms prescribed by the Commission for the kind and character of work in which they seek to be employed, and the results of their examinations with such other information as the Commission may prescribe, together with proof of United States citizenship, shall be noted thereon."

It is our understanding that all applicants for appointment under the Civil Service Act are required to state in their applications whether they are citizens of the United States.

Under separate cover we are mailing you a printed report of the Civil Service Commission, City of Chicago, for the year 1925, which contains a reprint of the above mentioned Act, together with the rules and regulations of the Commission in force at that time.

In the case of *State Public Utilities Commission v. Early*, 285 Ill. 469, the Supreme Court of Illinois, in considering section 6 of the Illinois Civil Service Act—an

act similar to the one above mentioned, but relating to the State instead of cities—held that under that section, properly construed, a person who is not a citizen and resident of the State of Illinois is not eligible for examination, certification and appointment to a technical position in the classified civil service of the State.

However, we do not understand that an independent contractor, in doing contract work for the City, is prevented from employing alien labor.

In the year 1889 the Legislature of Illinois passed an Act (which was adopted and incorporated into the City Code) which made it unlawful for any board or commission, or any officer or other person acting for the state, or for any county, township, city, village, district, or other municipality in the state, or any contractor, or sub-contractor under any or either of said municipalities, to employ any person or persons, other than native born or naturalized citizens, or those who have in good faith declared their intentions to become citizens of the United States, when such employers are to be paid, in whole or in part, directly or indirectly, out of any funds raised by taxation. Smith-Hurd's Stat. 1927, chap. 6.

This Act was, by the Supreme Court of Illinois in the case of *City of Chicago v. Hulbert*, 205 Ill. 346, declared to be unconstitutional, the Court in its opinion saying:

“A similar law was enacted by ordinance in the City of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the Constitution and the right of individuals to contract. The statute in question is void upon the same grounds and neither the city nor the contractor was under any obligation to observe it.”

(No. 6155—January 13, 1928—L. H.)

1 BIDS, ACCEPTANCE, FORMAL CONTRACT.

The execution of a formal written contract is not necessary where a bid for specific material to be delivered within a definite time is given and accepted with the request to commence performance of the agreement pending the execution of a formal contract; but the better practice is to execute a formal contract and thereby avoid possible questions.

2 CONTRACT, PERFORMANCE, COMMENCEMENT.

The precise date when the performance of a contract shall begin depends upon the terms of the agreement itself. If the contract or bid expressly states that the work shall commence from the time a written notice of acceptance is received, performance must commence on the day of receipt of notice.

3 CONTRACTS, NOTICE OF ACCEPTANCE.

Any words indicating an intention to accept a bid are sufficient notice of acceptance. Thus the words "you are requested to proceed" is sufficient notice to the contractor to go ahead with the work.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date in which you refer to us the question of the enforcement of the liquidated damages clause in the contract entered into with the American District Steam Co. under date of July 21, 1927.

It appears, from the data submitted to us, that the American District Steam Co. was one of several bidders whose written proposals were opened on July 8, 1927. This written proposal was identical in form for all bidders, and it contained the following clause:

"The undersigned hereby agrees to deliver all material within a period of fourteen (14) days from the receipt of written notice to proceed with the work."

A letter signed by the Commissioner of Public Works was sent to the successful bidder under date of July 21,

1927, which stated that the City had elected to accept the offer, and that "pending the formal execution of the contract, you are requested to proceed under the other terms of the specifications." The letter further said, "Please advise of your acceptance." The exact date on which this letter came into the hands of the American District Steam Co. is involved in some doubt, but it would seem that it reached the bidder on July 25th and that a reply was sent under date of July 29th. If the date of receipt was later than the 25th, allowance should be made for that, because we construe the date of notice to be the date on which this letter was received by the contractor.

The contractor made shipment on August 10th, but the material was not received by the City until August 16th. Therefore, if the contractor received the letter of the Commissioner of Public Works on July 25th, the delivery was eight days overdue when made.

It is contended by the attorney for the contractor that the contract with the City was not in force at the time the written notice to proceed with the work was given. This position is not tenable. Certain rights accrued to the bidder the instant the bid was presented, and in like manner certain rights accrued to the City when it accepted the bid. The mere fact that the formal execution of a written contract was delayed for a while did not alter these conditions. The contractor had agreed to deliver the material within a fixed time beginning to run from the receipt of written notice to proceed and not from the date of the delivery of the written contract. This agreement, upon acceptance by the City, would have held even if the written contract had not been delivered until months afterwards. It is doubtful whether the execution of the formal written contract added anything to the obligation assumed by the contractor in advance of receiving it.

In a case where the contractor failed to sign a contract after it was awarded to him our Appellate Court held as follows:

"The plaintiff Carmody, in response to the advertisement by the park commissioners, made a definite bid for the work, and the park commissioners accepted his bid as made. The bid and its acceptance constituted a contract between the parties, and the execution thereafter of a formal written instrument embodying the terms of the contract would not be the contract itself, but merely evidence of it." *West Park Commissioners v. Carmody*, 139 Ill. App. 635.

While the above answers the questions that have arisen in this case you make an inquiry which appears to call for an opinion as to future dealings. Your question is as follows:

"1. Does the time for completing the work under a contract start from the date of receipt of notice to proceed; from the date of the contract; or from the date that contract is received by the contractor after contract has been executed?"

The answer to all three of the questions, which you combine into one, is that the specific terms of the contract must govern. From our experience with written contracts prepared in your department, we would say that these terms frequently vary from the one before us. If the bid is accompanied by a form of contract which is to be formally executed the whole instrument comprises the conditions under which the contract is entered into. In such a case, if it is stated, as in this case, that the time begins to run from the *receipt of written notice to proceed* with the work, the date of such receipt will be the date from which the time must be computed.

The date of the contract does not always control, and the date of the receipt of the contract by the contractor has nothing to do with the time limit unless it is expressly stated in the written contract that the time is to run from

the date of the receipt of the written contract. Your second question reads:

“2. Is the notice to proceed, sent to the contractor under date of July 21, 1927, and copy of which is attached, a valid notice or does the wording ‘you are requested to proceed’ make it less binding on the contractor?”

We regard the words “you are requested to proceed” as a sufficient notice to the contractor to go ahead with the work. No precise form of words is required, and therefore words which convey the meaning that these do unquestionably constitute valid notice to proceed with the work.

We do not wish to be understood by this opinion as advising you that it is not necessary to prepare and execute the written contract as expeditiously as possible. The signing up of such written contract and the delivery of same often avoids questions just like the ones you are confronted with in the particular case before you.

(No. 6156—January 14, 1928—E. C. H.).

1 CLAIMS, DEATH BENEFITS, LIABILITY.

Dependents of a deceased person are not entitled to death benefits where the deceased met death while on a mission of his own in no way connected with or incidental to his duties; as where he died of injuries sustained by being struck by an automobile while crossing a street to obtain an evening paper.

2 DEATH BENEFITS, AWARD.

Death benefits are awarded to dependents of a policeman or fireman only where the deceased, at the time of the accident, had been either directly engaged in the performance of his specific duties, or was doing some act relating or incidental to such duties.

Hon. John S. Clark, Chairman, Committee on Finance:

In reply to your communication of December 23rd addressed to the Hon. Samuel A. Ettelson, Corporation

Counsel, in which you ask to be advised as to the liability of the City for payment of a death benefit in the matter of the death of Fireman William Tierney of Engine Co. No. 125, who died as the result of an injury sustained by being struck by an automobile while crossing Grand avenue near Natchez avenue to obtain the evening paper, the following opinion is submitted:

The State Legislature passed an act entitled "An Act authorizing Cities and Villages to provide for the payment of allowances of money to the families or dependents of policemen or firemen killed or fatally injured while in the performance of their duties." This Act was approved June 27, 1921 and was amended by increasing the amount of such payment from \$5,000.00 to \$10,000.00 by an Act approved June 30, 1925. (Smith-Hurd's Stat. 1925, chap. 24, par. 867, p. 477.) Section 1 of this Act provides:

"That, in addition to all other powers now granted by law, the City Council of any city and the president and board of trustees of any village may, by general ordinance, provide for the payment of an allowance of money, to be fixed by such City Council or board of trustees, as the case may be, to the family or dependents of any policeman or fireman employed by such city or village in case he is killed or fatally injured *while in the performance of his duties*. The sum so fixed shall not exceed \$10,000.00 and shall be payable only in case the injury arises from violence or other accidental cause and death is directly due to such cause and results within one year after such injury."

The City Council of the City of Chicago on January 16, 1926, passed an ordinance amending chapter LXII of the Chicago Municipal Code of 1922, in which provision was made "for the payment of allowances of money to the family or dependents of any policeman or fireman of the said city of Chicago, in case he is killed or fatally injured *while in the performance of his duties*."

It appears from the communications attached to your letter that Fireman Tierney was a member of Engine Co. No. 125 and was on duty at the fire station during the day (November 16, 1927) upon which he received the injuries resulting in his death; that about 7:40 P. M., he left the station, located at 2323 No. Natchez avenue, for the purpose of getting an evening paper, and while walking across Grand avenue he was run over by an automobile and received the injuries resulting in his death.

The question, therefore, presented in this case, is whether Fireman Tierney was fatally injured "*while in the performance of his duties.*" The right of his family or dependents to compensation must be determined under the particular provisions of the statute above quoted, and it will be observed that the statute authorizes payment only in the event that the policeman or fireman "is killed or fatally injured while in the performance of his duties."

While in the numerous cases presented to our courts of review for decision there have been at times a liberal tendency displayed in construing similar statutory provisions, nevertheless the courts have at all times laid down the rule that the deceased, at the time of the accident, must have been either directly engaged in the performance of his specific duties, or in doing some act relating or incidental to such duties. Perhaps the latest expression from our Supreme Court in laying down the rule, is found in *People v. Retirement Board*, 326 Ill. 579, where the Court, in construing this same statute said, at page 583:

"When Donovan was killed he was performing a task assigned to him by his superior officer, *and that task was in connection with his duties as a member of the band and octette of the police department.*"

In the present case it appears that at the time Fireman Tierney received his fatal injuries, he was on a mission

of his own in no way connected with, or incidental to, his duties as a fireman, and therefore, we are of the opinion that however unfortunate may be the circumstances of his death, the City would not be justified in voluntarily making "payment of an allowance of money" to the family or dependents of Fireman Tierney as provided by the statute and ordinances passed in pursuance thereof. The courts are open to the widow or family of Fireman Tierney, in which they may have a judicial determination establishing their right, if any, to the benefits created by the statute and ordinances.

(No. 6157—January 17, 1928—F. J. C.)

LICENSE BOND, SURETIES.

In order to better safeguard the interests of the City, it is better business policy to accept surety companies in place of individuals as sureties on license bonds.

Hon. Morris Eller, City Collector:

In response to your letter of recent date in which you ask for advice as to whether your office should in the future refuse to accept license bonds, the sureties on which are individuals who schedule real estate, or whether you should accept surety companies as sureties, we desire to say, that it is the experience of this department in the acceptance and approval of bonds, that the best business policy is to accept surety companies in preference to personal sureties because of the complications which have arisen in the past, both as to the effects of bonds given to the City and to individuals.

Our attitude in this matter is mainly an advisory position to heads of departments so that we may protect them

from what might amount to serious complications where personal sureties are accepted on the bond. It has been the experience in the past that in many instances persons who act in the capacity of sureties and schedule real estate to qualify as sureties, often, while the bond is still in force and effect, transfer the property that they have scheduled to a third person, and in doing so take from the individual, or from the City, his or its security to recover under the bond in case of a default upon the part of the principal of the bond.

We call your attention to the fact that the mere signing of a bond on the part of an individual as a surety, in no wise creates a lien against the property scheduled by the surety, unless that prior to the time of the transferring of the property, a judgment be rendered against the surety by reason of the damage sustained by the person secured by the bond, on account of a default of the person for whom the bond is given. While on the other hand where a surety company is surety on the bond we have the protection of the assets of that company and the regulatory provisions of the statute fixing certain conditions for the protection of the person to whom the bond is given. Such surety companies, by these statutes, are compelled before they do business in this State, to file a statement of their assets and in general follow regulations which amply protect the person accepting them as security.

This department feels that it is more a matter of business policy than a matter of expediency to ask the heads of the departments, for their own protection, to co-operate with this department in this matter. We believe that it is sound business policy to require applicants to obtain sureties so that the City will be in a position to enforce any liability that may accrue by reason of persons de-

faulting under their contracts, or defaulting under any duty that may be required of them under the ordinances; and this is especially true where the person, firm or corporation has engaged in a business which is of itself a dangerous and hazardous undertaking and which in itself places the public in danger of injury, either to person or to property.

We, therefore, have no hesitancy in advising you that you should refuse to accept license bonds, the sureties on which are individuals scheduling real estate holdings, and that you should, as a matter of business policy and as a matter of safeguarding the interests of the City, accept only such bonds as are executed by surety companies as surety.

(No. 6158—January 19, 1928—F. J. V. et al.)

1 EPIDEMICS, BOARD OF HEALTH, POWER.

The City Board of Health and not the Commissioner of Health has the power to determine when a contagious and infectious disease exists for the purpose of quarantine with authority to make rules and regulations for the suppression of epidemics.

2 MUNICIPAL CODE OF 1922.

Section 1781 is void in that it confers upon the Commissioner of Health power to make rules and regulations in case of impending contagious or epidemic disease when such power and authority can be delegated by the City Council under the Cities and Villages Act only to a duly constituted Board of Health.

3 DOGS, RABIES.

Dogs may be killed under sections 1060 and 1061 of the Municipal Code of 1922 only when they are suffering from rabies.

Hon. Arnold H. Kegel, Commissioner of Health:

The opinion of the Law Department is requested as to what may lawfully be done to meet an emergency in the

matter of the protection of the public health and safety against a prevalent and dangerous condition of rabies. Numerous people have been bitten by mad dogs and reports of such cases continue to come in. An emergency exists for the control and suppression of a threatened epidemic of rabies. Drastic action is considered, such as an emergency order or regulation of the Commissioner of Health for the killing of all stray dogs.

This case involves the exercise of the police power, which is one of the three great powers inherent in every government. In the exercise of the police power we must be mindful of the constitutional law principle of the separation of powers among the three branches of government, and, particularly in this case, between the legislative and the executive branches of the City government, respectively the City Council and the Department of Health. The exercise of the police power is for the legislative body. The Commissioner of Health is an executive officer, and has no powers except such as are conferred by the City Council, pursuant to legislative authority.

We have examined the Cities and Villages Act for the powers granted to the City Council in this matter and certain ordinances adopted pursuant thereto, namely, the ordinance creating the Department of Health and another consisting of general regulations pertaining to Dogs, and we are of the opinion that the question submitted to us is governed and decided by the case of *People ex rel. Barmore v. Robertson et al.*, 302 Ill. 422.

What seems to be taken as authority vesting in the Commissioner of Health power to make regulations and enforce them in the existing emergency is the original section 1781 of the ordinance establishing the Health Department. (Municipal Code 1922, Ettelson, chap. XXXIX, art. I, p. 538.) That section provides that:

“In case of contagious or epidemic disease or of danger from anticipated or impending contagious or epidemic disease, or in case the sanitary condition of the city shall be of such a character as to warrant it, it shall be the duty of the commissioner of health to make such rules and regulations and to take such measures and to do and order to be done and cause to be done such acts for the preservation of the public health (though not herein or elsewhere or otherwise authorized) as he may in good faith believe and declare the public safety and health demand, and all such rules and regulations so declared by the commissioner of health to be emergency rules and regulations shall, as soon as may be after the promulgation of the same, be reported by the said commissioner to the city council for approval and adoption in the form of ordinances.”

This grant of power to the Health Commissioner, however, is declared void by the Supreme Court in the case cited, because the Cities and Villages Act empowers the City Council to delegate such authority only to a duly constituted Board of Health.

That is the case in which Jennie Barmore instituted habeas corpus proceedings in the Supreme Court, alleging that she was unlawfully restrained of her liberty at her home in Chicago by John Dill Robertson, Commissioner of Health. The answer to the writ admitted such restraint and alleged that it was made by virtue of the authority of the statutes of the state, and the ordinances of the City, and the rules and regulations of the State Department of Health. Her detention was claimed to be necessary for the preservation of the health of the citizens of the City and the State.

The decision goes fully into the powers of the City, and these are set out in the language of the Supreme Court itself, as follows:

“By the Cities and Villages act the city council in cities is given power ‘to regulate the police of

the city or village and *pass and enforce all necessary police ordinances.* * * * To appoint a board of health, and prescribe its powers and duties. * * * To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease * * * and to pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council * * * shall deem proper: *Provided, no fine or penalty shall exceed \$200 and no imprisonment shall exceed six months for one offense.* Pursuant to these powers the city of Chicago has established by ordinance an executive department of the municipal government of the city known as the department of health, which embraces the commissioner of health, the city physician, and other assistants and employees. The commissioner of health, who is required to be a physician, is made the head of the department of health and is given the management and control of all matters and things pertaining thereto. He is appointed by the mayor, by and with the advice and consent of the city council. The commissioner is given general supervision over the sanitary condition of the city, and is given authority to appoint and to remove his assistants and all other officers, inspectors and employees in the department of health. It is made the duty of the commissioner to enforce all laws of the State and ordinances of the city and all rules and regulations pertaining to the public health, *and he is given power to make such rules and regulations in relation to the sanitary condition of the city and for the prevention and suppression of disease as he may deem necessary or advisable, but such rules and regulations are not to be in force until approved by the city council, except in cases of emergency.* (Our italics.) The commissioner and his assistants and employees are given full police powers, and are given authority to enter any building in the city for purposes of inspection, and to quarantine and examine and remove to isolated hospitals afflicted persons, and to arrest any person who violates any of the provisions of the ordinances and any of the rules and regulations of the department."

The court in this case held that the Commissioner of Health of the City of Chicago had no power by virtue of the ordinance, and that the City Council was without power to enact such ordinance authorizing the Commissioner to determine when a contagious or infectious disease exists, and to establish a quarantine. In our opinion, the situation in the present case is analogous to the case cited, for the same statutes and ordinances apply to both cases. Since the case cited is decisive of the question here involved, we prefer to quote the gist of the court's opinion in that case (302 Ill. 422, 434), which is as follows:

“The only question presented for determination is whether she is legally and properly detained under quarantine in her home. In order to determine this question we must determine whether an authority authorized by the legislature of this State to determine when a person is afflicted with a contagious or infectious disease and to quarantine against the spread of such disease has acted in establishing the quarantine over the home and person of relatrix. The legislature has granted to cities the power to appoint a board of health and to prescribe its duties and powers. A board of health must necessarily consist of more than one person, and it generally consists of several persons. Many authorities contend that the administration of public health should be vested in an individual, and that that individual should be a person trained in the science of public health. This contention is based on the ground that this form of administration of the health laws is productive of efficiency and economy. The same argument might be made in favor of an absolute monarchy, but the experience of the world has been that other forms of government, perhaps more cumbersome and less efficient, insure to the people a more reasonable and less arbitrary administration of the laws. Whatever may be best, the legislature of Illinois has said that the public health of cities shall be regulated and guarded by a board of health, and until the legislature grants to cities the power to supervise the sanitary and health conditions of the city by another instrumentality the cities must content themselves with the power

that has been given to them. *The city council had no authority to delegate to a health officer the powers and duties which the legislature said it might delegate to a board of health.* (Our italics.) The powers given to boards of health are extraordinary, and the legislature was evidently unwilling to leave to one person the determination of such important and drastic measures as are given to such boards. In the judgment and fidelity of a greater number acting together is the greatest security against the abuse of extraordinary power. In *Taylor v. Adair County*, 119 Ky. 374, 84 S. W. 299, it was held that a county board of health did not have power to delegate its duties to a health officer. In *Commonwealth v. Yost*, 197 Pa. 171, 46 Atl. 845, it was held that a board of health had no authority to delegate to its secretary power to act in a matter requiring the action of the board. In *Young v. County of Blackhawk*, 66 Iowa 460, 23 N. W. 923, it was held that a board of health could not delegate its powers to a committee appointed by the board. *The health commissioner of Chicago is purely a ministerial officer and has no legislative powers whatever. The statute gives to no such individual authority to make rules and regulations which shall have the effect of law. The city has no right to give him authority to determine when a contagious and infectious disease exists and to establish a quarantine. His authority is limited to carrying into execution proper orders of a legally constituted board of health.* (Our italics.) *People v. Board of Education*," 234 Ill. 422.

Since "the city has no right to give (the Commissioner of Health) authority to determine when a contagious and infectious disease exists and to establish a quarantine," for the same reasons the Commissioner of Health has no right to determine when an epidemic of rabies exists and to suppress it by measures of his own adoption.

The action of the City health authorities in the Robertson case was sustained by reason of the authority of the State Department of Health, to which the case had been reported by the local authorities. Referring to this, the Supreme Court in that case, said:

“While the original quarantine was established without authority of a legally constituted board of health, the State Department of Health has, by authorizing the modified quarantine, in effect established such quarantine on the report of the department of health of the City of Chicago.”

And this suggests a similar procedure in the present case submitted for our consideration, if no board of health is created by ordinance of the City Council, or no board is appointed and organized pursuant thereto.

The Municipal Code of 1922 on Dogs in sections 1060 and 1061 provides as follows:

“It shall be the duty of every veterinarian or other person who discovers any dog or other animal to be suffering with rabies to report such fact immediately to the commissioner of health. Such report shall give the name, if known, and the place of residence of the person owning or harboring such dog, the place where the dog can be found and the license number of said dog, if known. Provided, that such dog or other animal shall be immediately taken up and impounded in the manner provided in the preceding section, and securely kept until the commissioner of health can make or cause to be made an examination of said dog or other animal; and if, upon such examination, it shall be determined that said dog or other animal is suffering with rabies, said animal shall be immediately killed. Any person violating any provision of this section or neglecting or refusing to comply with any of the provisions hereof shall be fined not less than ten nor more than two hundred dollars for each offense.

“Any dog suffering from rabies or any dog bitten by a dog suffering from rabies is hereby declared to be a nuisance, and such dog may be slain by any policeman. It shall be the duty of any person owning or exercising ownership or agency over any such dog to surrender said dog to any policeman upon demand. Any person refusing or failing to so surrender such dog upon demand, shall be fined not less than two dollars nor more than two hundred dollars.”

Since the City Council by these sections of the ordinance on Dogs has seen fit to make only such provisions for the killing of dogs suffering from rabies, it must be deemed to be the intention of the law making body that only in such cases shall dogs suffering from rabies be killed, and by the principle of exclusion, it must also be held that such dogs may not be killed in any other cases.

If the powers and authority expressly granted by this ordinance pertaining to the general regulation of dogs, and particularly with reference to rabies, are not deemed sufficient, then full power to do any and all things that may be adopted by the City Board of Health, which has been duly created by the City Council, first by ordinance of date January 13, 1926, Journal of Proceedings, and recently amended by ordinance of date January, 1928, Journal of Proceedings.

By this ordinance as now amended all powers and authority which, by the original section 1781, herein set out, were erroneously vested in the Commissioner of Health, are now conferred in the same terms upon the Board of Health in full accord with the Robertson case, *supra*.

The Commissioner of Health may, therefore, propose for adoption, and the duly constituted Board of Health may ordain and establish such measures and regulations and authorize the Commissioner of Health to enforce them as may be deemed necessary and proper to meet the existing situation as here presented. And the Commissioner of Health must look to the official action of such board for any authority he may exercise in the premises.

(No. 6159—January 23, 1928—F. J. V. et al.)

1 APPROPRIATIONS, MERGED POSITIONS, CIVIL SERVICE.

A position which is next lower in the City civil service merges in the next higher position where the City Council appropriates an amount sufficient to cover the salaries of both positions under the latter position and fails to appropriate for the other position. Thus an appropriation for twice the salary of a fire engineer without appropriating for an assistant fire engineer both positions being the same in their duties and the amount of salary merges the latter into the former position.

2 CIVIL SERVICE, MERGED POSITIONS, ELIGIBLE LIST, APPOINTMENT.

Upon the merger of one position into another similar position in the City's classified civil service those on the eligible list for the position which has been merged are entitled to appointment in case of vacancy in the higher position according to their place upon such list, where the new or vacant position is similar in line of work and at approximately the same salary as the old position.

3 CIVIL SERVICE, MERGED POSITIONS, RECLASSIFICATION.

When one position in the City's civil service is merged into the next higher position it is the duty of the Civil Service Commission to reclassify such positions.

4 CIVIL SERVICE POSITION, ABOLISHMENT.

The City Council is without power to abolish an existing civil service position and recreate the same position under another name.

Hon. A. W. Goodrich, Fire Commissioner:

You report to the Law Department the situation arising out of the failure of the City Council in its Appropriation Ordinance for 1928 to make any provision of salary for those holding the positions of Assistant Fire Engineers. You report that upon recommendation of the Fire Department the City Council has made the appropriation "51 A 4 Fire Engineer, 266, @ \$2880.....\$766,080," the intention thereby being to merge the former position of assistant fire engineer in that of fire engineer.

The Council has, therefore, made appropriation for as many fire engineers as there formerly were in both positions of fire engineer and assistant fire engineer. The reasons for so doing were that both positions heretofore paid the same salary and were considered as involving practically the same work; but whatever the reasons, it is certain the City Council, as the legislative branch of the City government, has the power thus to abolish the position of assistant fire engineer, and also to provide for the increased number of fire engineers.

The immediate effect of this Council action was to transfer all of the present holders of the abolished position of assistant fire engineer to the re-instatement eligible list for certification and appointment to the first new position that might be created, or the first vacancy that might occur, both of which must be filled by certification of the Civil Service Commission and appointment by the Fire Commissioner, providing that such new or vacant positions are similar in line of work and of approximately the same salary as the old position.

Section 3 of the Civil Service Act makes it incumbent upon the Civil Service Commission to classify all offices and places of employment in the civil service, and section 7 of Rule I of the Civil Service Rules of November 15, 1925 provides that "titles shall be indicative of the branch, class and grade or rank of each position in the classified service, and changes shall be reported to the Commission."

The Council's creation of the many new positions of fire engineer, and its purpose to merge the former position of assistant fire engineer with that of fire engineer, having been duly reported to the Civil Service Commission, it becomes the duty of the Civil Service Commission under the provisions of the Civil Service Law and the Rules of the Commission to modify their existing classification in re-

spect to the former titles, and to fill the new positions as by the law and rules required. *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462.

It is our opinion that all of the present acting assistant fire engineers are entitled automatically by reason of the City Council's action to be immediately placed on the roster of fire engineers. This is for the reason that the City Council has expressed such intention, and further for the reason that the City Council may not abolish an existing civil service position and recreate the same position under another name, and thereby oust the present incumbent. *Opinions of Corporation Counsel*, 1924-1925 p. 459; *People ex rel. Rohm v. Finn et al.*, 237 Ill. App. 361; *City of Chicago v. Luthhardt*, 191 Ill. 516.

For the same reasons and upon the same authorities, the rights of those persons whose names appear upon the present posted eligible list for appointment to the former position of assistant fire engineer are affected in like manner as the rights of the present fire engineers, themselves. That is, as such assistant fire engineers are now entitled to certification and appointment as fire engineers, so are these eligibles to the position of assistant fire engineer now entitled to appointment and certification to the position of fire engineers, after all the present assistant fire engineers have been duly certified and appointed to the new position. In other words, if the total number of fire engineers and assistant fire engineers do not make the total number of fire engineers provided for by the Appropriation Ordinance of 1928, then any additional number of such positions remaining unfilled must be filled by certification and appointment from such eligible list.

(No. 6160—January 26, 1928—F. J. V.)

1 FIRE COMMISSIONER, DISABLED FIREMAN.

In case of sickness or injury of a fireman which injury is not the result nor is in consequence of the performance of duty, it is the duty of the Fire Commissioner to report the facts to the Pension Retirement Board with a recommendation to transfer the disabled fireman from the regular payroll to the pension fund.

2 CIVIL SERVICE EMPLOYEES, DISCHARGE OR REMOVAL.

A department head has no power to discharge or remove a Civil Service employee from his position nor to withhold his salary but the discharge can be effected only by order of the Civil Service Commission after hearing on written charges.

Hon. A. W. Goodrich, Fire Commissioner:

On the 17th instant, you presented a request for an opinion "as to the Fire Department's right, according to the ordinance, to pay or withhold salaries for the duration of absences of active members of the uniform force whose absence from duty, on account of sickness or injury, or both, are not the result of, nor the consequence of, performance of duty." To your communication you attach the files of the case of Fireman Fred Timmerman. These files tend to establish just such a case as you inquire about.

Your inquiry is fully covered and answered by our opinions given to the Fire Commissioner. These are of date October 13, 1925, (Opinions of Corporation Counsel 1925-1926, p. 378); and another of date February 17, 1926, Opinions of Corporation Counsel 1925-1926, p. 566.

The law is established that the department head has no power to discharge or remove a civil service employee from his position, or, what is the same in effect, to withhold salaries. In the class of cases you present, the duty is plainly prescribed by sections 9 and 10 of the Firemen's Pension Fund Act, (Cahill's Stat., 1923, par. 950, p. 697),

and that duty must be discharged in every case by the Board of Pension Trustees. All the Fire Commissioner can do is to report the facts and the evidence to the Board and recommend the transfer of such disabled firemen from the regular pay roll to the pension fund.

In no other way may a fireman be taken from the pay roll except upon order of the Civil Service Commission after hearing on written charges, as prescribed by section 12 of the Civil Service Act.

(No. 6161—February 1, 1928—L. H.)

1 AVIATION FIELD, IMPROVEMENTS.

As lessee of a tract of land under a lease for 25 years for an aviation field with the right to sublet portions of the premises for purposes connected with the operation of aircraft, the City has a right to make such improvements on the property as is contemplated in the lease.

2 SCHOOL LAND, SALE OR EXCHANGE.

Original school sections can be disposed of only in lots of not more than 80 acres, and this must be done at public auction.

Hon. William Hale Thompson, Mayor:

You have asked for information concerning the right of the City to purchase certain property from the Board of Education for the purpose of establishing an aviation field. You further asked whether, if this can be accomplished through a long time lease, the City would be justified in making improvements on such property. In addition to this you have asked whether it would be possible for the City to transfer or convey a portion of its property, like the Clarendon Beach property, to the Board of Education in exchange for land of the Board of Education.

The particular land which has been mentioned in this connection is a part of Section 16, Township 38 North, Range 13 East of the 3rd P. M. which the City has already leased for the purposes of an aviation field. This lease was entered into on January 30, 1926. It runs for a term of 25 years and provides for an annual rental of \$1,560.00. The area transferred thereby comprises about 247 acres. The lease was entered into in pursuance of authority granted by an ordinance of the City Council passed on February 24, 1926 (see Council Journal, p. 2649). The lease is now in the possession of the City's Real Estate Agent.

There does not seem to be any reason why the City should be prevented from making improvements on this aviation field, subject to such conditions as are agreed upon in the lease. The lease provides, among other things, that the City has the right to sub-let such portions of the premises as it shall desire as sites for hangars, and other purposes in connection with the operation of air-craft. There are other provisions in the lease which indicate that the City contemplates the making of improvements on the property.

With respect to the transfer of City property for Board of Education property, that is possible under an Act passed in 1925, entitled "An Act Concerning the Powers of Certain Municipal Corporations with Respect to Real Estate" (Cahill's Stat., 1927, p. 427). The rights of the Board of Education, however, are limited. The property in question is part of section 16, one of the original School sections ceded by the Federal Government to the State of Illinois for school purposes, and is subject to the limitation placed upon it by Statute; see sections 227 and 229 of the School Act, Cahill's Stat., 1927, p. 2316.

Under section 227 of the School Act there can be no subdividing of this section into lots of more than 80 acres, and

under section 229 there must be a sale at public auction in case any of it is to be disposed of.

There are some special features of the School Law which relate particularly to the sale of school lands in the City of Chicago, but it would seem that the requirements of the Statute just mentioned must be observed. Consequently there is a legal difficulty in the way of securing the 247 acres provided for by the lease, either through direct purchase or by means of the transfer which is contemplated by the Act of 1925 above referred to. It may be possible to overcome this difficulty by amendment of the Statute, if that should be found desirable.

(No. 6162—February 4, 1928—F. J. V.)

1 OILS, SALE, PROHIBITION.

The City Council under present statute has no power to establish a standard of quality for oils and gasoline and to prohibit their sale if below such a standard.

2 OIL, INSPECTION ACT. SCOPE.

The Oil Inspection Act does not prohibit the sale of inferior quality of oil but has to do solely with safeguarding life and property against the dangers of fire.

3 CITIES AND VILLAGES ACT.

Clause 54, section 1, article 5 is limited to regulation of the goods therein enumerated and excludes the power of prohibition.

4 CITIES AND VILLAGES ACT.

Clause 65, section 1, article 5 does not grant authority to prohibit the sale of inferior oils.

Hon. Daniel A. Serritella, Inspector of Weights and Measures:

In your recent communication, you say that:

“The Committee on Finance, having under consideration the question of eliminating the sale of inferior

grade or quality of gasoline and motor fuel oils in Chicago, requested me to ask you for an opinion as to whether the city has the power to pass an ordinance establishing quality standards with proper penalties for selling or offering for sale gasoline or oils that do not meet the specifications."

The proposed ordinance would be purely a police power measure. There is doubt about the Legislature itself having the power, under the Constitution, to prohibit the sale of inferior qualities of such oils unless it can be shown that there is danger to life and health in such sales. It might be regarded as a deprivation of property without due process of law. However, there is authority for assuming that it comes within the proper exercise of the police power of the Legislature to enact such proposal into general law and that it may be construed as a reasonable exercise of such power in the promotion of the public welfare. *Mutual Loan Company v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74; *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. 554.

The question here presented, however, is whether or not the Legislature has vested such power in the City Council. Unless such power is expressly or by necessary implication granted to Cities and Villages, the proposed ordinance would be invalid. *Potson v. City of Chicago*, 222 Ill. App. 50; *City of Chicago v. Murphy*, 313 Ill. 98.

The statute entitled "An Act in relation to oil inspection," passed in 1915 (Smith-Hurd's Stat., 1927, p. 1889), confers certain powers with respect to such oils on cities and villages, but that act manifestly has to do with safeguarding life and property against the dangers of fire, and it cannot be invoked for the purpose of prohibiting the sale of inferior qualities of oil. A flash test is provided for in this law, and such oils as do not meet the necessary requirements may be condemned for illuminating purposes,

but they may be sold for other purposes. There are other regulations that can be imposed under this statute, but all oils may be sold thereunder when such reasonable regulations as may be imposed are complied with.

Under clause 65 of section 1, article V, of the Cities and Villages Act (Smith-Hurd's Stat., 1927, p. 314), the City is given somewhat similar powers as those conferred under the oil inspection statute. It was held, in the case of *City of Chicago v. Burke*, 226 Ill. 191, that the Legislature, by the Oil Inspection Act, resumed control over the subject of oil inspection formerly conferred on municipalities by clause 54 of section 1, but the decision says nothing of the powers conferred by clause 65. Said clause, so far as it relates to the subject in hand, reads as follows:

“Sixty-fifth. To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitroglycerine, petroleum, or any of the products thereof, and other combustible or explosive material * * *.”

While the above clause gives the City authority to do many things that are not included in the Oil Inspection Act, there is no authority granted therein to prohibit sales of inferior oils.

The stated purpose of the proposed ordinance, as disclosed by your communication, is to *prohibit* and *penalize* the sale, or offer for sale, of gasoline or oils that do not meet specified quality standards. The following grants of power seem to be the only ones specifically relating to sales that are contained in the Cities and Villages Act:

“Fiftieth—To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same and to control the location thereof.

“Fifty-second—To regulate the sale of bread in the city or village; prescribe the weight and quality of bread in the loaf.

“Fifty-third—To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.” Smith-Hurd’s Stat., 1927, p. 339.

It will be observed that in each instance the grant of power is to regulate, and not to prohibit. Power to regulate is not power to prohibit. *City of Chicago v. Netcher*, 183 Ill. 104, 109; *Merced County v. Fleming* (Cal.), 43 Pac. 392; *State ex rel. Woodward v. Skeggs* (Ala.), 46 So. 268, 273; *In Re Hauck* (Mich.) 38 N. W. 269; *Municipal Corporations*, 28 Cyc. 751; 6 Words and Phrases, p. 566.

It will be observed that only by clause 52, in the grant of power to regulate the sale of bread, is the Council expressly empowered to prescribe the *quality* to be sold, and this exercise of the police power is designed to promote the public health. In the sale of other articles, such as are enumerated in clauses 50 and 53, the quality thereof also may be prescribed as a necessary and proper exercise of the police power in the promotion of health by virtue of the grant of power by clause 78, which is known as the health clause. But nowhere in the Cities and Villages Act is there granted, either expressly or by necessary implication, any power to prescribe the quality of any article of merchandise for sale which is not related to the promotion of the public health, such as gasoline and oil.

By the well-known statutory construction principle of exclusion, these specific grants of power must be taken as an expression of the intention of the Legislature to exclude all other powers not enumerated in such grants. There is, therefore, no power in the City Council to prescribe the quality of gasoline and oil that may be sold.

Furthermore, the only general and complete grant of police power to the City Council is that with reference to

the all important element of the public health, and that is contained in said health clause 78, which is as follows:

“Seventy-eighth—To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.”

In the case of no other police power purpose, such as the public safety, morality and general welfare, is there a grant of such general power as is given in the case of public health. By the same principle of exclusion, therefore, all such power must be construed as having been reserved to the Legislature, and not granted to the City Council.

The grant of power respecting sales contained in clause 54, of said section, which has already been mentioned, reads as follows:

“Fifty-fourth—To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise.”

Even if the Supreme Court had not said that this no longer refers to oils, it would be noted that the power granted is merely “to regulate,” not to prohibit. The power granted thereby is merely to regulate “the inspection, weighing and the measuring” of certain articles mentioned, “and any article of merchandise,” which would include gasoline and oil were it not for its exclusion by later statute; but there is no grant of power to regulate the sale, or to prescribe the quality of the article for sale. Here again, the principle of exclusion must be held to apply and to deny to the City Council any power to prescribe the quality of gasoline and oil to be sold.

In *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 26 Sup. Ct. 341, it was said that:

“The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to pro-

mote the public health, the public morals, or the public safety, and that the validity of a police regulation must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose.’’

We know of no such legislation ever having been enacted in Illinois as is proposed by this ordinance, and we believe that the only police power purpose to warrant such legislation would be to protect the people against fraud that might be practiced in the sale of gasoline and oil; and in the case of its exercise, the power would be limited to the regulation of the sale and inspection of quality, and could not lawfully be extended to prohibit the sale and prescribe the quality.

We are of the opinion that there is not only no grant of power to the City Council to adopt the proposed ordinance and that there is no policy of the state to warrant its adoption, but we believe also that the ordinance is unconstitutional as an unwarranted interference with the liberty, property and contract rights of the citizens. *City of Chicago v. Netcher*, 183 Ill. 104, 109; *People ex rel. Roos v. Kaul*, 302 Ill. 317; *Bessette v. People*, 193 Ill. 334.

The courts scrupulously guard the inalienable rights of the citizen to life, liberty and the pursuit of happiness against illegal and unwarranted exercise of legislative power. The humblest citizen may, in the exercise of his liberty, use such oil or gasoline as he sees fit, though it be of the crudest and most inferior quality, provided its sale, storage and use is attended with such safeguards as the legislative authority may impose as necessary or reasonable.

(No. 6163—February 6, 1928—L. H.)

ANNEXATION PROCEEDINGS, LAW DEPARTMENT POLICY.

The policy of the Law Department before as well as since the Act of 1927 is to avoid participation in preliminary annexation proceedings and to disregard notice of petition for annexation unless the City Council directs participation.

To The Honorable, The City Council of the City of Chicago:

We beg to advise you that a petition for annexation has been filed in the County Court of Cook County on behalf of parties seeking to annex the following described property to the City of Chicago:

“The North East Quarter ($NE\frac{1}{4}$) of Section Twenty-three (23), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian.

“Also, all of the South East Fractional Quarter (SE Fractional $\frac{1}{4}$) Section Twenty-three (23), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, lying North of the Indian Boundary Line.

“Also, all of Section Twenty-four (24), Township forty (40) North, Range Twelve (12), East of the Third Principal Meridian.

“Also, the North Half ($N\frac{1}{2}$) of the North East Quarter ($NE\frac{1}{4}$) of Section Twenty-five (25), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian.

“Also, the South West Quarter ($SW\frac{1}{4}$) of the South East Quarter ($SE\frac{1}{4}$) of Section Fourteen (14), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian.”

The property above described is located west of the present City limits at North Harlem avenue, extending from Wellington street to Irving Park boulevard at the City limits, and irregularly extending westward to a distance of three miles beyond the present City limits.

Under the present law relating to annexation of unincorporated territory as enacted in 1927, a petition of a majority of the property owners and voters of such territory is first passed on for sufficiency by the County Court, and then may be acted on by the City Council. The City Council may order a referendum, or it may, by a two-thirds vote, annex the territory; such an ordinance, however, being subject to a referendum if called for within thirty days after the passage of the ordinance by ten per cent of the voters of the City.

It is the practice of the law department to avoid participation in annexation proceedings unless the City Council directs such participation. This policy had always been adhered to in the past until such time as a vote was taken. Such vote was required in all cases before the recent Act was passed. If the vote was favorable to annexation, the law department regarded it as a mandate from the voters to assist in effecting the annexation.

Although the present law changes the procedure, it will be the policy of the law department to adhere to the practice of the past and pay no attention to any notice of the kind that has been served on the City, but let such parties in the territory affected as desire to oppose the petition do so on their own responsibility. No assistance will be tendered to either of the parties unless the City Council directs otherwise.

We have explained the situation at length in this communication because of the change in the law, in order that your Honorable Body may understand it fully.

(No. 6164—February 6, 1928—F. J. C.)

FRONTAGE CONSENT, PARK COMMISSIONERS, FILLING
STATION.

Park Commissioners holding the legal title to all park lands for the use of the people have power to give frontage consents for property under their control.

Mr. John Touhey, Division Marshal in Charge of Fire Prevention:

In your two letters of recent date you request an opinion regarding the power of the Northwest Park District to sign frontage consents to locate tanks for filling stations at 5055-59 Fullerton avenue. In connection therewith you have enclosed letters from Mr. Otto Rentler and a copy of a resolution adopted by the Northwest Park District Board.

The question presented in this case is one that is now being tried before Judge Friend in the Circuit Court in the case of *Klein v. Saltiel et al.* In this case the complainant has asked for a writ restraining the City and the City officials from issuing the permit involved in the premises herein referred to.

The main question presented in your letters is whether or not the Park Commissioners have power to sign frontage consents for property under their control and jurisdiction. This question has been solved in the affirmative in the case of *Theurer v. People*, 211 Ill. 296. The court said in this case at page 298:

“It is said, however, that the park commissioners have no legal right to sign for the park frontage, and it is urged for that reason that frontage should be eliminated in determining the number of feet of frontage for which signatures of a majority must be obtained. If the contention of appellant that said commissioners have no power to sign for said property be conceded to be sound, we do not think it follows that the park frontage should not be considered in

determining the amount of frontage for which signatures must be obtained. If a portion of the frontage belonged to a minor or a lunatic, such owner would have no legal right to sign the application for a dram-shop license by reason of his minority or mental incapacity, but because of his non-age or insanity his frontage could not lawfully be eliminated from the total amount of frontage upon the four streets surrounding the block in which the dram-shop was to be kept but would be required to be considered. So, here, the park frontage must be taken into consideration in determining the amount of frontage for which the signatures of owners must be obtained.

"We do not, however, think the contention correct that the park commissioners have no legal power to sign for the park frontage. The legal title to all park lands is in the commissioners. In *People v. Salomon*, 51 Ill. 37, it was said (p. 52); 'It is argued that this park property belongs to these commissioners as a corporation. This is so by the terms of the act. They hold the fee, but the usufruct is in the public; but holding it, they hold it as a public corporation for public purposes.' The park board was created by an act of the legislature approved February 24, 1869, as amended April 26, 1869, by which it is provided that all lands acquired by said commissioners shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, free to all persons forever; and it is also provided that they shall have full and exclusive power to govern and manage said park, to lay out and regulate the same, to pass ordinances for the regulation and government thereof, and that said commissioners shall possess all the power and authority over said park now by law conferred upon the city council of the City of Chicago in respect to public squares and places in said city. The powers thus conferred upon said commissioners over the real estate of the park, it will be observed, are very broad. It is the duty of the commissioners to improve and beautify said lands and to make the park a safe and pleasant place for the resort of the entire community, and it is not unreasonable to hold that they are interested in protecting the park and the public who resort thereto from surroundings which may be unwholesome, obnoxious or dangerous."

And further on page 300 the court said:

“We think it clear that the South Park Commissioners, for the purpose of giving consent to the granting of a dram-shop license authorizing the keeping of a saloon upon property abutting upon a street which adjoins park property, is an owner, within the meaning of said ordinance, and that the park frontage upon Cottage Grove avenue and Fifty-first street must be considered in determining whether the application filed by the appellant was signed by the majority of the property owners, according to frontage, upon the four streets surrounding the block in which the said dram-shop was to be kept.”

It will be seen from the language of this decision that park property must be considered as part of the frontage necessary to be taken into consideration in obtaining frontage consents, and the language is so broad that there can be no doubt that the power of the Park Commissioners is broad enough to sign such frontage consents, and in doing so they are acting wholly within their legal rights, and if there is the requisite number of front feet with the park frontage included, then the license as applied for should be issued.

(No. 6165—February 6, 1928—L. H.)

1 WATER MAINS, RELOCATION, EXPENSES.

The cost of the relocation of water mains made necessary by a change of grade in a street must be charged against the Water Fund, as the City is regarded the same as any other public utility operating in the street.

2 PUBLIC UTILITIES, STREETS, CHANGED CONDITION, EXPENSES.

A company which operates a public utility in a street which has been changed in the interest of the public must make the street conform to the changed condition at its own expense.

Hon. Richard W. Wolfe, Commissioner of Public Works:

In your letter of recent date you inquire whether the expense of relocating certain water mains, made necessary

on account of street and bridge improvements, can legally be charged against the Water Fund.

You state that, in connection with the construction of a viaduct approach to the North La Salle Street Bridge from the south line of Kinzie street, you will have to abandon existing water mains and replace them with mains of the same diameter at new locations; that these mains are being relocated on account of a change of grade in the street and to avoid interference with the foundations of the viaduct now under construction; that the viaduct is being built out of the bridge bond funds; and that the proposed changes do not benefit the water system.

The City maintains and operates the water works in its private corporate capacity, and as such is subject to the same obligations with respect to the location of its mains as is any other public utility with respect to the lines, conduits, tracks, or other utilities which it maintains in the public streets. We have always held that the use of the public street for purposes of travel is paramount to any rights that may have been acquired by public utilities located therein, and that where it becomes necessary in the interest of the public to make a change in the street the company operating a public utility therein must make it conform to the changed conditions at its own expense.

The same rule must be held to apply to the relocation of water mains in cases where they must be changed to conform to new street conditions. It would not be proper to charge, the expense of making such changes in the City's bridge bond fund, but the cost must be borne by the Water Fund.

(No. 6166—February 6, 1928—L. H.)

1 CITY COMPTROLLER, APPROVAL OF EXPENDITURES, CUSTOM.

The Comptroller is not justified in following a custom for the approval of expenditures from certain funds which custom had been changed by the City Council.

2 BOND FUNDS, CONTROL BY CITY COUNCIL.

The disposition of bond funds is within the control of the City Council under its authority over the finances and property of the City and the power to make appropriations for its needs from the various funds.

3 APPROPRIATIONS, EXPENDITURE, APPROVAL, CITY COUNCIL.

The approval of expenditures from a specific fund, such as the Street Improvement Bond Fund may be changed from one department head to another or certain expenditures from the same fund may be ordered approved by one department head and other expenditures from such a fund may be ordered approved by another department head in the discretion of the City Council.

Hon. Charles C. Fitzmorris, City Comptroller:

In the letter of the Auditor under date of the 4th instant, addressed to the Corporation Counsel, he seeks advice as to payments to be made from bond funds. The question arises because there has been some change made in the current year's appropriation bill from the former method of disbursing street improvement bond funds.

The letter calls attention to the sub-heading or note which appears under the caption "Street Improvement Bond Funds" in the Annual Appropriation Bill (Council Journal, p. 1845), which reads, "to be expended under the direction and authority of the Board of Local Improvements, except as otherwise provided." It is further pointed out that at another place under the same caption there is a different sub-heading or note which says, "to be expended under the direction and authority of the Corporation Counsel." Also that there are several accounts which provide

that they are "to be expended under the direction of the Corporation Counsel in accordance with the official classification."

The letter of the Auditor further states that it has been your rule in the past, whenever any expenditure is to be paid out of bond funds, that it should carry the approval of the head of the department under whose supervision the bond issue is to be expended. The question asked is whether the Comptroller should continue to follow such practice. While that practice will still prevail, there seems to be a misunderstanding as to what department head is clothed with the authority, or perhaps it is assumed that all expenditures must be under the authority of only one department head.

The sub-headings referred to were drafted in accordance with advice from the Law Department, and we see no reason why they should lead to confusion. The bond issues authorized by the City Council are subject to its control. They do not pertain to any particular department, but are to be expended by such department head as the City Council directs.

It has been the custom of the City Council in former years to direct that expenditures from the Street Improvement Bond Funds should be made under the supervision of the Board of Local Improvements. While that custom prevailed it was proper for you to require the approval of the head of that branch of the City government for expenditures therefrom.

This year the Council has departed from the custom of requiring all such expenditures to be under the supervision of the Board of Local Improvements. It has divided the appropriations made from the Street Improvement Bond Funds in such a way that a part of them are to be made by the Board of Local Improvements and a part of

them by the Corporation Counsel. To this end it has provided that "except as otherwise provided" the appropriations are to be expended under the direction and authority of the Board of Local Improvements; but it has "otherwise provided" in the case of those appropriations "to be expended under the direction and authority of the Corporation Counsel."

It is entirely within the discretion of the City Council to make such disposition of the bond funds in question, since it is its duty to control the finances and property of the City and to make the appropriations for the needs of the City from its various funds. Cities and Villages Act, art. V, sec. 1, cls. 1 and 2; art. VII, sec. 2; Cahill's Stat. 1927, pp. 312, 319.

It will therefore be sufficient, as to such appropriations as the Corporation Counsel is authorized to expend, to have his approval on vouchers presented thereunder.

(No. 6167—February 9, 1928—G. F. M.)

1 BENEFIT FUNDS, DUTY DISABILITY, PAYMENT.

Duty disability is payable an employee who was injured while going at 8:45 P. M. to mail a daily report required by his department in a town in which he was making inspections.

2 WORDS AND PHRASES.

An "act of duty" within the Municipal Employees' Benefit Fund Act contemplates any injury occurring in the course of and arising out of the work of a municipal employee.

Retirement Board, Municipal Employees Annuity & Benefit Fund:

Replying to your request for an opinion as to what constitutes an "act of duty" justifying the payment of duty disability under the Municipal Employees Annuity and Benefit Fund Act, the following is submitted:

Your letter states that Chas. L. Ertzman, a food inspector in the Department of Health, was employed by the City of Chicago in Mason City, Iowa; that on the evening of December 6, 1927, at about 8:45 P. M., Mr. Ertzman was walking from the hotel to the mail-box to mail his daily report to the Department of Health in Chicago; that as he stepped from the sidewalk to the street he fell on the slippery pavement and broke his left leg.

I have been informed by the health department that Mr. Ertzman was inspecting a dairy or dairies in Mason City, Iowa, from which milk was being shipped into the City of Chicago; that the health department requires their out of town inspectors to mail in a report each day of any inspection made and the results thereof; and that the health department also requires that the report in question shall be deposited in a government mail-box and not in a hotel letter box in order to insure its prompt transmission.

In the case of *People ex rel. Margaret Donovan v. Retirement Board*, 326 Ill. 579, the Supreme Court of Illinois rendered an opinion involving a somewhat similar question. Daniel Donovan, the deceased husband of Margaret Donovan, was a police officer connected with the police band and octette and was crossing the street to mail a letter ordering some music by direction of his superior officer. On his way to the letter box Donovan was struck by an automobile and died as the result of his injuries. At that time the Policemen's Annuity and Benefit Fund Act (which is similar to your annuity and benefit fund) did not define the term "act of duty," and the Supreme Court, in awarding compensation annuity to the widow of Donovan, used the following language:

"The Legislature does not qualify the word 'duty' and there is nothing in the act to indicate that it intended that it should apply only to duties peculiar alone to policemen. We are of the opinion that any

injury occurring in the course of and arising out of the work of a policeman is an injury incurred in the performance of any act or acts of duty. When Donovan was killed he was performing a task assigned to him by his superior officer, and that task was in connection with his duties as a member of the band and octette of the police department."

The phrase "act of duty" is not qualified or defined in the Municipal Employees Annuity and Benefit Fund Act and it would therefore appear that under the above decision any injury occurring in the course of and arising out of the work of a municipal employee should be construed as an injury resulting from the performance of an "act of duty."

Upon the facts as hereinabove stated, Mr. Ertzman would be entitled to be paid duty disability pursuant to section 46 of the Municipal Employees Annuity and Benefit Fund Act.

(No. 6168—February 9, 1928—G. F. M.)

CONSERVATORSHIP, POSSESSION OF PROPERTY, CHECK PAYABLE TO WARD.

Upon the appointment of a conservator and notice thereof all property belonging to the insane person or ward must be delivered to the conservator; so that a check made payable to the ward before the appointment of the conservator should be delivered to the conservator and not to the ward.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

Confirming verbal opinion heretofore given as to the right of a conservator to be given a check of his ward issued prior to the appointment of the conservator, the following is submitted:

Your letter states that a conservator was appointed for Matthew Walsh on January 19, 1928, and that Mr. Walsh

is a beneficiary of your fund, drawing ordinary disability benefits; that a payment of ordinary disability benefit was due Mr. Walsh on January 1st of this year; that the check for said payment was in your possession at the time the conservator was appointed; and that both Mr. Walsh and the conservator have made demand for the check.

Section 5 of chapter 86 of the Revised Statutes of Illinois (Smith-Hurd's Stat. 1927, page 1757) gives to the conservator the care and management of the real and personal estate of his ward.

Section 11 of the Act (page 1758) makes it the duty of the conservator to "demand and sue for and receive in his own name, as conservator, all personal property of and demands due the ward."

The mere fact that the check had been prepared and was in your possession before the conservator was appointed does not give Mr. Walsh any right to the check. Any money paid to an insane person after the appointment of a conservator, is paid at the risk of the payer. Once a conservator has been appointed and notice thereof given to a party, all property belonging to the insane person must be delivered to the conservator.

(No. 6169—February 10, 1928—G. F. M.)

BENEFIT FUND, PAYMENT OF SALARY AND ANNUITY NOT PERMISSIBLE.

Upon re-entering service before a municipal employee is 65 years of age the payment of an annuity to such an employee ceases regardless of whether the employee is under permanent or temporary appointment.

Retirement Board, Municipal Employees Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a municipal employee to be paid a benefit and at the

same time a salary during employment, being employment under temporary authority, the following is submitted. Section 34 (A) of the Municipal Employees Annuity and Benefit Fund Act contains the following provision:

“When any municipal employee who shall resign or be discharged from the service after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, and shall re-enter the service before he shall have attained an age of sixty-five (65) years, any annuity previously granted to such municipal employee and any annuity fixed for the wife of said employee shall be cancelled.” Smith’s Stat. 1927, p. 584.

Section 34 (B) of the Municipal Employees Annuity and Benefit Fund Act contains the following provision:

“When any such municipal employee shall re-enter the service after he shall have attained an age of sixty-five (65) or more years, payments on account of any annuity previously granted to such municipal employee shall be suspended during the time thereafter that he shall be in the service, and when he shall again resign or be discharged therefrom, payments upon the annuity previously granted shall be resumed.” *Id.*, p. 584.

In accordance with the above provisions, I am of the opinion that a municipal employee cannot be paid an annuity and a salary at the same time by the City of Chicago under the law as it now reads. The fact that such annuitant or pensioner enters the service as a “temporary” appointee instead of entering as a permanent employee is immaterial, as the provisions of the law above quoted do not qualify the words “re-enter the service” nor limit the application of the words or of the law to “permanent employees.”

(No. 6170—February 10, 1928—G. F. M.)

1 RETIREMENT BOARD, MONEY ON DEPOSIT.

A sum not to exceed the amount required to pay all annuity and disability benefits maturing within 60 days must be kept on deposit and held uninvested, by the Retirement Board of the Policemen's Annuity and Benefit Fund.

2 BENEFIT FUNDS, INVESTMENT, BOARD ACTION NECESSARY.

Moneys in the Policemen's Annuity Benefit Fund should be invested only upon the affirmative action of a majority of the Retirement Board ordering the investment or purchase of the bonds which order must appear in the minutes of the Board.

3 RETIREMENT BOARD, INVESTMENT, BONDS PURCHASABLE.

The bonds purchasable for investment by the Retirement Board are United States bonds, state, county, municipal and school district bonds, Federal Farm loan bonds and tax anticipation warrants.

4 RETIREMENT BOARD, INVESTMENT, COMMISSIONS.

The payment of commissions to anyone officially connected with the Retirement Fund on account of investments is prohibited.

5 CITY TREASURER, ANNUITY AND BENEFIT FUND.

The City Treasurer is by statute made the custodian of the Policemen's Annuity and Benefit Fund and all bonds and securities in which the fund is invested, and such Treasurer is required to give indemnity bond to the Retirement Board in the amount fixed by them to secure the faithful discharge of his duties. Every two years, the Director of Trade and Commerce is required to make a thorough examination of the Annuity and Benefit Fund.

6 WORDS AND PHRASES.

The word "assets" in the Policemen's Annuity and Benefit Fund Act means the total value of cash and other property held; and bonds must be held at their book value.

*Hon. Wm. O. J. Hattstaedt, President, Retirement Board,
Policemen's Annuity and Benefit Fund:*

Replying to your request for an opinion for the guidance of the Investment Committee of the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago, the

following is submitted: Section 6, paragraph E of the Policemen's Annuity and Benefit Fund Act (Pamphlet page 10) specifies the following as part of the power and duty of the Retirement Board:

"Invest the moneys of said annuity and benefit fund in interest bearing bonds of the United States, or of the State of Illinois, or of any county of the State of Illinois, or of any city, village, incorporated town, municipal corporation or school district in said State, or in Federal farm loan bonds issued in accordance with the Federal Farm Loan Act, or in tax anticipation warrants issued by the city in which such annuity and benefit fund shall be operating. Any bond purchased by the said retirement board shall be registered in the name of the annuity and benefit fund herein provided for."

Section 7, of the Act (Pamphlet page 11) makes the City Treasurer the custodian of the funds, and into his keeping must be placed all bonds or other securities in which are invested any monies of the fund, said section being in the following words:

"The city treasurer of such city shall be the treasurer and custodian of the annuity and benefit fund herein provided for and shall furnish to the said retirement board a bond of such amount as the said board may designate, which bond shall indemnify the said board against any loss which may result from any action or failure to act on the part of such treasurer and custodian or any of his agents. All fees and charges incidental to the procuring and giving of such bond shall be paid by said retirement board."

Section 9 of the Act (Pamphlet page 12) regulates the matter of commissions on investments and reads as follows:

"No member of the retirement board, nor any person officially connected with said board, either as an employee of said board, or as legal advisor thereof, or as a custodian of the annuity and benefit fund herein provided for, shall have any right to receive any com-

mission on account of any investment made by said board."

Section 12 of the Act (Pamphlet page 15) regulates the value at which bonds and investments shall be held by defining the word "assets" to mean the following:

"The total value of cash and other property held. Bonds shall be held at their book value."

Section 52 of the Act (Pamphlet page 56) gives to the Board the right to hold a certain sum on deposit to meet current disbursements and reads as follows:

"For the purpose of paying annuities and disability benefits, the retirement board may at all times keep and hold uninvested a sum not in excess of the amount required to make all annuity and disability benefit payments which shall become due and payable within the following sixty (60) days. Such sum or any part thereof shall be kept on deposit in any bank in the State of Illinois, organized under the laws of said State as a State Bank, or organized under the laws of the United States as a National Bank; provided, that the amount which said retirement board may deposit in any such bank shall not in any case exceed twenty-five (25) per cent of the paid up capital and surplus of such bank."

Section 61½ (Pamphlet page 64) provides for an examination of the fund by the Director of Trade and Commerce of this State biennially, and reads as follows:

"The Director of Trade and Commerce of this State shall have the power and it shall be his duty to make a thorough examination of the affairs of the annuity and benefit fund herein provided for before December 31, 1926, and biennially thereafter. The said Director of Trade and Commerce shall report the result of any such examination with such recommendations as he may deem proper to the Governor for transmittal to the General Assembly and shall send a copy of any such report and recommendations to the retirement board of such annuity and benefit fund, and to the

city council of such city, which city council shall spread such report and recommendation in full upon the official record of the proceedings of the meeting of such city council at which they shall be received."

No such examination has as yet been made for the reason that no funds were provided to pay for making such examination until the last Session of the Legislature. It is to be expected that the examination referred to in section 61½ will hereafter be made pursuant to a certain law enacted at the last session of the Legislature (Laws 1927, p. 557) making it the duty of the Director of Trade and Commerce, or any deputy duly appointed by him under the official seal of the Director of Trade and Commerce, to make a thorough examination of the affairs of any annuity and benefit funds in this State made up in whole or in part from taxes; such examination to include an audit of the funds and a report regarding the securities held in such fund for loans and investments made out of such fund. Smith-Hurd's Statute 1927, p. 1654.

No bond should be purchased nor monies of the fund invested without affirmative action on the part of the majority of the board authorizing and ordering such purchases and such investments which order must be made a matter of record in the minutes of the meeting since any purchases or investments made without such order on the part of the board are not made in accordance with the Act creating the board.

A copy of this letter is being forwarded to Trustee Staver and Trustee Horwich, as members of the Investment Committee.

(No. 6171—February 10, 1928—G. F. M.)

DUTY DISABILITY, PAYMENT.

A field nurse who is injured after leaving a lecture which she was attending under instructions from the Health Department is not entitled to the payment of a duty disability because under present statute there is no provision for the payment of a duty disability for injuries received while going to or returning from the performance of a duty but only for injuries received while in the performance of an act or acts of duty.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a municipal employee to be paid duty disability for injuries incurred in connection with attendance at a lecture, the following is submitted:

Your letter states that on December 6, 1927, Esther Werner, a field nurse employed by the health department of the City of Chicago, was attending a lecture in accordance with instructions from the health department; that this lecture was given at 4 p. m., on the date stated in the Auditorium of the Medical and Dental Arts Club Building; that at about 4:45 p. m., while leaving this building, Mrs. Werner went through the drug store located on the ground floor of this building in order to reach the street quicker; that she did not notice a very low step just inside the door of the drug store, and that she fell and sprained her right ankle.

It does not appear from your statement of facts that Mrs. Werner was in the performance of any act or acts of duty at the time she suffered the injury in question, but on the contrary had finished the "act of duty" required of her and was on her way about her own business. The Municipal Employees' Annuity and Benefit Fund Act does not provide for the payment of duty disability for injuries

received while going to or returning from the performance of duty, but grants such benefits only for injuries received while "in the performance" of an act or acts of duty.

Under the facts hereinabove stated I am of the opinion that Mrs. Werner would be entitled only to ordinary disability benefit as provided in section 47 of the Municipal Employees' Annuity and Benefit Fund Act.

(No. 6172—February 11, 1928—L. H.)

1 BUILDINGS, DEFECTIVE WALL, DEMAND FOR REMOVAL.

A demand by the Commissioner of Buildings upon the Fire Commissioner to put in safe condition an unprotected wall of a building must state that a dangerous condition exists, that the Commissioner of Buildings has given notice to the owner of the unsafe condition of the wall, that the owner has ignored such notice or that an extreme emergency exists which prevents the Commissioner of Buildings from giving notice, and that he wants the walls to be torn down.

2 FIRE COMMISSIONER, DEFECTIVE WALL.

It is the duty of the Fire Commissioner with reasonable care to tear down a wall which has become dangerous to life and limb, of which dangerous condition its owner has been notified but has failed to comply with the notice; or where the case is too urgent to give notice.

Hon. Albert W. Goodrich, Fire Commissioner:

You forwarded to this department a letter received by you from the Commissioner of Buildings, under date of February 7, 1928, wherein it is stated that a building inspector reports that the walls on the front of the building at the southeast corner of Franklin street and Wacker drive are in a very bad condition; that bricks are falling into the street; and you are told to "arrange to have walls all put in safe condition at once." You have asked for an opinion as to your rights and duties under the circumstances.

The Commissioner of Buildings has extraordinary powers with respect to dangerous or defective walls, and may call upon the Fire Commissioner to tear down such walls under certain conditions. Such conditions, however, not only must be present when he makes the demand on you to remove the walls, but it is necessary that the Commissioner of Buildings shall have complied with every requirement of law before making the demand and that he shall state specifically what shall be done and why. In other words, it is not enough to say that the walls are dangerous and that he wants you to arrange to put them in safe condition; he must say that the dangerous condition exists, that he has given the requisite notice, that the owner has failed to act in response to such notice, or that an extreme emergency exists which prevents him from giving notice, and that he wants the walls torn down.

Under section 403 of the Chicago Municipal Code of 1922 the Commissioner of Buildings is required to give notice of the defective conditions to the owner and specify a time within which such conditions must be overcome. If he is unable to find the owner such notice may be given by mailing and posting of notice. If the unsafe condition is not remedied within the time specified the Commissioner of Buildings may exercise his extraordinary powers and cause the structure, or such part of it as is dangerous, to be torn down. Like powers are given under section 404 where a building has been or is being constructed in violation of the Building Code. By section 405 the Commissioner of Buildings may direct the fire department to remove such dangerous or defective wall or any structure built in violation of the Building Code. The language of the part of section 405 applicable thereto is as follows:

“The Commissioner of Buildings shall have authority to direct the fire marshal to tear down any defective or dangerous wall or structure or any building or

structure or part thereof which may be constructed in violation of the terms of this chapter, after written notice has been served upon the owner, lessee, occupant, agent or person in possession, charge or control, directing him or them to tear down or remove any defective wall, building or structure, or any part thereof, which is in a dangerous condition, which has been, or is being constructed or maintained in violation of the terms of this chapter."

In case of an emergency, where it would endanger life and limb to delay action for the purpose of serving notice and awaiting compliance therewith, the Commissioner of Buildings may even dispense with notice; at least such is the inference which arises from the fact that the Code makes his decision and order absolute and final. But it would not be proper to demolish a wall or structure without such notice except in extreme cases. That power may be exercised under section 409 of the Chicago Municipal Code of 1922, which reads as follows:

"Whenever the decision of the commissioner of buildings upon the safety of any building or any part thereof is made in a case which is so urgent that failure to properly carry out his orders to demolish or strengthen such building or part thereof may endanger life and limb, the decision and order of the commissioner of buildings shall be absolute and final."

Where the Commissioner of Buildings makes demand on you to tear down a wall and states that he has given notice and the notice has not been complied with, or that the case is too urgent to permit the giving of notice, it is your duty to tear down such wall. In such a case no responsibility attaches to you further than to carry out the order with reasonable care. If any damage results which is actionable the liability therefor is not yours.

(No. 6173—February 14, 1928—L. H.)

1 CITY FUNDS, DEPOSITARIES, DEPOSITS.

A bank which has been designated as a depositary of City funds is not disqualified by submitting a bond for less than the amount stated in its bid, but such a bank should be given deposits only to the extent of the amount of the bond furnished where the designation of the bank as a depositary did not specify the amount to be awarded to the bank.

2 ADVERTISEMENT FOR BIDS, CITY FUNDS, DEPOSITARIES.

Advertisement for bids to become depositaries for City funds should specify that the banks will be required to submit bonds for the full amount of their bids before they will be designated as depositaries.

Hon. Charles C. Fitzmorris, City Comptroller:

We have received word from you and also from the City Treasurer that certain of the banks that were named as City Depositaries for the year 1928, submitted bonds for less amounts than the amounts they bid for. The question therefore arises whether these banks have qualified under the law as City Depositaries so as to enable you to deposit City funds therein.

While the law seems to contemplate that all banks bidding for deposits shall have awards of fixed amounts and shall submit bonds for such amounts, we do not believe that banks that were named as depositaries this year should be disqualified if they filed bonds for smaller amounts, but deposits should be limited to the amounts of their bonds.

The statute controlling the subject requires the Comptroller to advertise for bids and to submit them to the City Council, which then makes awards accordingly. Nothing is said in the law concerning the submission of bonds before the awards are made. The statute then says:

“No bid shall be awarded to any financial institution other than a regularly organized State or national bank, and no money shall be deposited with any

bank or such award be effective until such depository shall have delivered to the comptroller a bond to the city in such sum and with such sureties as the city council shall approve, conditioned in like manner as other official bonds given by public officials charged with the custody of money. The city council shall have power to pass all necessary ordinances to carry the foregoing provisions into effect and provide rules applicable thereto." Art. XII, part two, sec. 5, Cities and Villages Act, Cahill's Stat., 1927, p. 358.

In pursuance of the authority thus given to it, the City Council has enacted ordinances specifying the manner in which bids shall be obtained and submitted to the Council. Under section 28 of the Chicago Municipal Code of 1922 reference is made to the form of the advertisement and bid as provided by ordinance of January 10, 1916, appearing on pages 2827 to 2835 of the Journal of the Proceedings of the City Council of that date. This ordinance provides that no bids will be considered except those of regularly organized State or National Banks, and that no moneys will be deposited with any bank, nor will any award be effective, until such depository shall have delivered to the City Comptroller a bond running to the City of Chicago "in an amount equal to the amount which such bank or depository shall be designated as being entitled to receive upon its bid."

Again, section 29 of the Chicago Municipal Code of 1927 provides that:

"No money shall be deposited in any bank nor any award be effective until such bank has been designated as a depository and shall have first delivered to the comptroller an indemnifying bond running to the City of Chicago, to be approved by the city council, in an amount equal to the amount which the city council shall determine such bank or depository shall be entitled to receive upon its bid."

Thus, it will be seen that the method prescribed by law provides that the City Council shall name the depositaries and specify the amounts which they are entitled to; that then the banks respectively should file bonds for the amounts that have been awarded to them. By this means the amount of the bond in each case is absolutely fixed.

This method was not followed for the current year. The City Council on December 28, 1927 (Council Journal pp. 1576-1579), named the various banks that had presented bids as depositaries for City funds, but it did not specify how much was to be awarded to each. Consequently, there is no way of fulfilling the provisions of the ordinance which says that a bond is to be filed "in an amount equal to the amount which the City Council shall determine such bank or depositary shall be entitled to receive upon its bid," except that when the bond of the depositary is approved by the Council that act fixes the amount of the award.

We are, therefore, of the opinion that any bank which was accepted as a depositary may file its bond, and, if the bond is approved by the City Council, it fixes the amount of City funds which the bank may receive as a depositary and makes the award effective to that extent even if the bond is for a smaller amount than the bid.

We recommend that in the future the exact procedure specified by law, as outlined above, ought to be followed in the submission of the bids and the making of the awards, and to that end we suggest that the advertisement should specify that banks will be required to submit bonds to the full amount of their bids before being named as depositaries.

(No. 6174—February 17, 1928—F. A. W.)

SHADE TREES, INJURY OR DAMAGE FROM, LIABILITY.

A city is not liable for damages sustained from the blowing down of a shade tree in the absence of actual or constructive notice of the defective condition of the tree.

Hon. John S. Clark, Chairman, Committee on Finance:

You recently submitted to us for an opinion, the claim of Mrs. Kate Schulz, 4432 Wilcox street, for damage to the bannister of the stairs leading to the front entrance of building known as 4431 Wilcox street caused by a tree being blown down during a storm.

Our investigation shows that the tree in question was a large one located in front of 4431 Wilcox street, and that the City had no information relative to this tree prior to the accident.

The case of *Jones v. Greensboro*, 124 N. C. 310 was an action for damage for personal injuries occasioned by reason of a dead limb falling on plaintiff from a shade tree on the sidewalk. The defense was that the defendant had no notice of the defective condition of the tree. The court, on page 312 said:

“The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts, from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent defects must be remedied, but reasonable care must be exercised to discover defects. For it has been well said that ‘negligent ignorance is not less a breach of duty than wilful neglect.’ So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety

of the defect, open to reasonable observation, but if it be concealed or obscured in any way so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it." *Stanton v. Salem*, 145 Mass. 476; *Cook v. City of Anamosa*, 66 Ia. 427; *Mayor v. Sheffield*, 4 Wallace (U. S.) 196.

"In the case of *Gubasco v. City of New York*, 1 N. Y. Supp. 215, where a decayed tree being struck by a heavy truck fell upon and injured the plaintiff, the court held that if the tree was dangerous but appeared safe, to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay."

We are of the opinion, that in view of the foregoing, the claim of Mrs. Kate Schulz should be declined.

(No. 6175—February 17, 1928—F. A. W.)

CLAIM FOR DAMAGES, CITY OFFICERS OR EMPLOYEES,
LIABILITY.

The City is not liable for the negligent acts of its officers or employees "while in the discharge of their duties."

Hon. John S. Clark, Chairman, Committee on Finance:

You recently submitted to us for an opinion, the claim of Julius and Bertha Witt, 1657 North Sawyer avenue, for damage to property sustained at their store by a City fire engine crashing through the side of the building on August 28, 1927.

Irrespective of actual responsibility for this accident, the City of Chicago is not legally liable. The law is well established that "cities are not liable for the negligent acts of the officers or men employed in their fire department while

in the discharge of their duties.” *Wilcox v. City of Chicago*, 107 Ill. 334; *Nicastro v. City of Chicago*, 175 Ill. App. 634.

In view of the foregoing, we are of the opinion that this claim should be declined.

(No. 6176—February 17, 1928—F. A. W.)

CONTAGIOUS DISEASES, NONRESIDENT, HOSPITAL CARE.

Nonresident patients treated at the municipal contagious disease hospital must pay a fee of \$25.00 per week for hospital care.

Hon. John S. Clark, Chairman, Committee on Finance:

You recently submitted to us for an opinion, the claim of Theodore Kowol, 5826 West 23rd street, for refund of charges paid for care of Sheldon Kowol while a patient at the Municipal Contagious Disease Hospital.

Our investigation shows that Theodore Kowol during the month of May, 1927, was a resident of Riverside, Illinois, and that his child, Sheldon Kowol, contracted a contagious disease. Theodore Kowol made arrangements to have his child treated at the Municipal Contagious Disease Hospital and a charge of \$25 per week was made for four weeks by the hospital.

The Chicago Municipal Code of 1922, chapter XXXIX, art. 1, sec. 1777, entitled “Fees and charges to be made by the Department of Health,” provides as follows: “Municipal Contagious Disease Hospital—A fee of \$25 per week shall be charged and collected from non-resident patients given hospital care at the Municipal Contagious Disease Hospital, and from patients, residents of Chicago, willing to pay such fee; provided that patients paying a fee may

have the privilege of having their own physician and nurse care for them in the hospital.”

The fact that Theodore Kowol was a non-resident of Chicago made it necessary, under the provisions of the aforesaid ordinance, for the hospital to charge for the treatment of his child.

In view of the foregoing, we are of the opinion that the claim of Theodore Kowol should be declined.

(No. 6177—February 17, 1928—L. H.)

1 PUBLICATION, OFFICIAL NEWSPAPER.

No more than one newspaper can be selected as the official newspaper for any specific year by the Mayor, the Comptroller and the Chairman of the Finance Committee constituting a board for the purpose.

2 PUBLICATION, DAILY CALUMET.

The Daily Calumet is a newspaper of general circulation although it is confined to one locality in the City of Chicago.

3 PUBLICATION, CHICAGO EVENING POST.

The Chicago Evening Post is a newspaper of general circulation.

Hon. Charles C. Fitzmorris, City Comptroller:

In your letter of the 14th instant signed by the Deputy Comptroller, you state that on January 28th the City Council authorized the Mayor and City Comptroller to accept the bid of either the “Daily Calumet” or the “Chicago Evening Post” for the official newspaper for the year 1928. You further state that the City Clerk reports that in his judgment it would be advisable to contract with both newspapers because he doubts the legality of publication of certain ordinances in the “Daily Calumet.” You ask advice in regard to the matter.

Under sections 2837, 2838 and 2839 of the Municipal Code of Chicago of 1922 the duty devolves on the Mayor, the Comptroller and the Chairman of the Committee on Finance, constituting a board for the purpose, to award the contract to one of the competitive bidders. When this is done the bids and the action of the board thereon must be submitted to the City Council, under section 2840. If the Council approves of the action of the board the paper selected by the board becomes the official newspaper, the contract to be let by the Comptroller.

It would seem from the communication of the board to the City Council (Council Journal, Jan. 3, 1928, p. 1682), that the board performed its functions, and awarded the contract to the "Daily Calumet." The function of the City Council was to either approve this award or reject it. Instead of that the Council approved an alternative award which was not before it. However, since the City Council did approve the award to the "Daily Calumet," as well as indicate that the board may re-award the contract to the "Chicago Evening Post," or to both papers if the board saw fit, the action of the City Council may be construed as approval of what the board has done. Hence, the contract may be entered into with the "Daily Calumet" if the members of the board have not changed their minds about it.

The ordinances of the City contemplate the selection of one newspaper as the official organ, and it will not be proper to name two. In fact, such a course would cast doubt on the validity of the publication.

With respect to whether publication in the "Daily Calumet" will be lawful, we beg to advise you that the Law Department has had occasion several times to make investigation on this point. The showing made by the paper at such times would seem to indicate that the "Daily

Calumet'' qualifies as a newspaper of general circulation under the following decisions: *Kerr v. Hitt*, 75 Ill. 51; *Hernandez v. Drake*, 81 Ill. 34; *Railton v. Lauder*, 126 Ill. 219; *Maass v. Hess*, 140 Ill. 576; *Pentzel v. Squire*, 161 Ill. 346; *Miller v. Barto*, 347 Ill. 104.

While the above cases cover the eligibility of legal newspapers, religious newspapers, etc., the question of the circulation being confined to one locality in the City has not been passed on. On that point we are not able to point to an absolutely authoritative case. Therefore our opinion as to the eligibility of the "Daily Calumet" is based on the showing made on a former occasion and on inferences drawn from the decisions above cited. The Chicago Evening Post (noon edition) was specifically held to be a newspaper of general circulation in *People ex rel. Stuckart v. Snow*, 279 Ill. 289.

We therefore advise you that you are at liberty to make a contract with the "Daily Calumet;" also that if for any reason the board desires to deliberate further on the subject and make a new award to the "Chicago Evening Post" such contract may then be made with the latter publication. It cannot be made with both publications.

It has been suggested to the writer that there is the likelihood of an attack on the sufficiency of the publication of the Annual Appropriation Ordinance in case the "Daily Calumet" is selected for that purpose.

(No. 6178—February 28, 1928—F. J. C.)

1 NUISANCE, HAULING DEAD ANIMALS, ADJACENT TOWNS.

A village or city in the interest of public health has power to regulate and prohibit the hauling of dead animals within its territorial limits if the hauling is done in such a way as to constitute a public nuisance.

2 INJUNCTION, PUBLIC NUISANCE, MUNICIPALITY.

A clear case of public nuisance may be abated by a municipality through injunction proceedings.

Hon. Arnold H. Kegel, Commissioner of Health:

We are in receipt of your letter of recent date in which you ask for an opinion as to whether or not the cities and towns adjacent to Chicago would have power under the statutes of obtaining an injunction or other adverse action to prevent the hauling of dead animals through such cities either by truck or railway.

The answer to this question depends primarily on the regulations or ordinances in force in the cities or towns through which such dead animals are hauled.

There is no doubt that under the statute if the hauling of such dead animals constitutes a nuisance *per se* that such towns or cities would have the inherent right to pass such regulations or ordinances as would abate the nuisance.

Chapter 38, Cahill's Statutes, 1927, at page 922, paragraph 453, declares as a public nuisance:

"1. To cause or suffer the carcass of any animal or any offal, filth or noisome substance to be collected, deposited or to remain in any place, to the prejudice of others.

"2. To throw or deposit any offal or other offensive matter, or the carcass of any animal, in any water-course, lake, pond, spring, well or common sewer, street or public highway."

So that it will be seen that under the statute and under the circumstances named in the statute that the carcass of an animal might well be considered a nuisance *per se*.

As to the power of regulation, the statutes provide in chapter 24, paragraph 65, subdivision 75, that the City Council shall have power:

“To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.” Callaghan’s Annotated Statutes, page 1107.

The 76th subdivision of the same paragraph provides that the City Council has the power to appoint a Board of Health and prescribe its powers and duties.

The 81st subdivision of said paragraph 65 provides that the City Council has the power:

“To direct the location and regulate the management and construction of packing houses, renderies, tallow chandleries, bone factories, soap factories, and tanneries, within the limits of the city or village, and within the distance of one mile without the city or village limits.”

Concerning the question whether or not the city or village could take adverse action to prevent the hauling of dead animals through their corporate limits it will be seen that under the powers conferred by the statute that the city or village through its proper corporate authorities would have the right and the power to make such regulations as are necessary in the interest of public health to prevent the creation of a nuisance or for the abatement of same.

We have no doubt that under these paragraphs of the statute considerable discretionary power is vested in the corporate authorities to declare what is and what is not a nuisance and the corporate authorities would have the power to regulate such hauling and drawing of carcasses.

In regard to the power of the cities or towns obtaining an injunction to restrain the use of their streets for the purposes named in your letter we desire to say that this question has been discussed completely in the case of *City of Chicago v. Shaynin*, 258 Ill. 69. At page 73 the court said:

“In the *Laugel* case, *supra*, it was held that the power granted by said clause 75 to the governing bodies of municipal corporations to declare what shall be nuisances and to abate the same, authorizes such bodies to conclusively denounce those things falling within the first and third classes to be nuisances, but as to those falling within the second class the power possessed is only to declare such of them to be nuisances which are, in fact, so. In *North Chicago City Railway Co. v. Town of Lake View*, 105 Ill. 207, it was held that if it be doubtful whether a thing is, in fact, a nuisance; the determination of the question requiring judgment and discretion on the part of the village authorities in exercising their legislative functions under the power delegated by this clause of the Cities and Villages Act, the action of such village authorities would be deemed conclusive of the question. To the same effect are *Harmison v. City of Lewistown*, 153 Ill. 313, and *Laugel v. City of Bushnell*, *supra*.

“Even though there might be a doubt whether the kind of exhibition or business conducted in the place kept by defendant in error tends to immorality and there might be an honest difference of opinion as to whether it was advisable to suppress such business as a nuisance, there can be no question as to the right of the city council to exercise its discretion and declare, by ordinance, such places common nuisances. On the facts in this case we deem such a declaration by the council conclusive on the courts. We are disposed to think, also, that if this business was against decency or public morals the ordinance could be upheld under clause 66, granting to municipalities the authority to pass and enforce all necessary police ordinances.”

The right of the City to abate a nuisance by injunction was discussed by the Supreme Court in the *City of Pana v. Washed Coal Co.*, 260 Ill. 111. At page 122 the court said:

“Courts of equity have power to give relief, whether against public or private nuisances, by compelling their abatement or restraining the continuance of their existence. This jurisdiction was not an original one and is of comparatively recent origin. The general rule is that it is exercised sparingly, with caution, and only in extreme cases—at least until after the right and the question of the nuisance have first been settled at law. (29 Cyc. 1219, and cases cited.) ‘To be entitled to an injunction against a nuisance the plaintiff must present a case of pressing necessity and of injury for which there is no adequate legal remedy.’ (2 Joyce on Injunctions, sec. 1044; 2 Beach on Injunctions, sec. 1044.) ‘In all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, for if the evidence be conflicting and the injury to the public doubtful, that, alone, will constitute a ground for withholding this extraordinary interposition. * * * The same doctrine is equally applicable to cases of private nuisance.’ * * * The equitable doctrines applicable to public nuisances are essentially the same as those that apply to private nuisances.

“Municipal corporations, in the exercise of power granted to them by the State to abate nuisances, may, under proper circumstances, call upon a court of equity for assistance. (*Metropolitan City Railway Co. v. City of Chicago*, 96 Ill. 620; 1 Am. & Eng. Ency. of Law, 2d ed., 73, note 1; 2 Joyce on Injunctions, sec. 1078.) The chief cause of the inadequacy of the remedies at law lies in the fact that the injury is irreparable or will occasion a multiplicity of suits. If there is a substantial dispute as to the fact or law and the question is in doubt, a trial at law will be required before equity will intervene. (Pomeroy’s Eq. Rem., sec. 542; see, also, Gould on Waters, 3d ed., sec. 507.) When, however, the existence of a nuisance has been established at law, a

court of equity will grant an injunction as a matter of course.”

From our examination of the above cases, we come to this conclusion, that if the city or village can establish the fact that the hauling of carcasses through the streets within their corporate limits constitutes a public nuisance then they would have the right to enjoin the same by applying for a writ of injunction. In any event, if they could prove a violation of the ordinance and have the matter adjudicated and convict the person violating that ordinance this conviction itself would be sufficient to show a nuisance and in order to prevent a multiplicity of suits in the showing of such conviction a court of equity would issue an injunction restraining persons from using the streets for the purposes outlined in your letter.

Under the decision last quoted it is said that when the existence of a nuisance has been established at law a court of equity will grant an injunction as a matter of course.

We are, therefore, of the opinion that the remedy by injunction and the remedy by prosecution for violation of any ordinance that has application to this condition may be resorted to by the cities and towns for the purpose of abating such nuisance.

(No. 6179—February 29, 1928—C. W. K.)

STREETS AND ALLEYS, TRAILERS, LENGTH AND WIDTH.

Within the limits of the City of Chicago no truck or trailer can be operated which exceeds 40 feet in length when coupled with a maximum width of a load which exceeds 8 feet, except under special permission from the Commissioner of Public Works.

W. R. Arthur & Company, 126-128 West 25th St., Chicago, Illinois:

Your letter of recent date in regard to length of truck and trailer that can be operated inside the City limits of the City of Chicago, and also the maximum width of load allowed on the highways, has been handed to me for reply.

In relation to the length of tractor or trailer, sections 4038 and 4039 of the Municipal Code of Chicago of 1922 provide as follows:

"No tractor or trailer shall be operated on the public streets or alleys of the city otherwise than on car tracks especially built for same, in case the bed, body or carrying part of such vehicle exceeds one hundred and two inches in width, or in case the overall length of same shall exceed forty feet when coupled except under a special permit as provided for under section 4039; provided, that nothing in this section shall be construed as giving authority for operating trailers on any street car lines where no right to run trailers now exist.

"The Commissioner of Public Works is hereby authorized to issue permits for the operation of trains consisting of tractors and trailers not exceeding one hundred feet total length, between the hours of eight p. m. and five a. m., at a rate of speed not to exceed eight miles per hour, on such route or routes as may be designated in the permit. Such trains shall carry, in addition to the lights prescribed by statute and the ordinances of the city a red light at the rear end and a white light under each trailer so placed as to be visible from all sides."

In regard to a maximum width of a load allowed on highways, paragraphs 3 and 5, section 3, chapter 95-A of Cahill's Statutes, 1927, provide as follows:

"(3) The maximum width of any vehicle and its load shall not exceed 8 feet, excepting loads of loose hay, straw, corn fodder, or other similar farm products, agricultural implements and threshing machines.

"(5) Where trailers are used the length of any vehicle or vehicles, combined with their trailers, shall not exceed 65 feet; *provided*, that upon application to the highway or street officials having proper jurisdiction over a particular highway special permits in writing may be granted for the operation of trains of trailers exceeding in length the foregoing, subject to such conditions as such highway or street officials may prescribe."

I am, therefore, of the opinion that no truck or trailer can be operated inside the City limits of the City of Chicago which exceeds 40 feet over all when coupled, except under special permission from the Commissioner of Public Works, and that the maximum width of a load upon the highways shall not exceed 8 feet.

(No. 6180—March 1, 1928—H. H. P.)

1 ORDINANCES, YATES AVENUE SUBWAY.

The ordinance of June 25, 1906, for the construction of subways in Yates, Paxton and Jeffery avenues as amended in June 22, 1927, is still in force notwithstanding the time for the completion of work has not been extended.

2 TRACK ELEVATION ORDINANCE, ABROGATION.

An ordinance requiring a railroad company to elevate its tracks over a certain street is not abrogated by the mere failure of the company to complete the work within the time specified if the ordinance does not provide for forfeiture or abrogation in case of delay in completion.

Messrs. West & Eckhart, First National Bank Bldg., Chicago, Illinois:

In your recent communication you requested of this office a compilation of the various ordinances extending

time for completion of the subway in Yates avenue, between 94th and 95th streets, under the tracks of the Chicago and Western Indiana Railroad and the Chicago, Rock Island and Pacific Railway.

The original ordinance was passed June 25, 1906, providing for the construction of subways in several streets in that vicinity. Particular reference to the subway in Yates avenue may be found on page 1031, Council Proceedings, 1906-07. The ordinance further provides that the construction of the subways in Yates avenue, Paxton avenue and Jeffrey avenue should be completed not later than December 31, 1916, page 1038, Council Proceedings, 1906-07.

On April 22, 1918, Alderman Michaelson moved the Council to consider a report of the Committee on Track Elevation on an ordinance amending the ordinance of June 25, 1906, to provide for an extension of the time for completion of the track elevation work. A motion prevailed, however, to recommit the report. (Page 2583, Council Proceedings, 1917-18.) It appears that no further action was taken on the proposed amendment.

On June 22, 1927, the City Council amended the ordinance of June 25, 1906, as to Jeffery avenue. (Page 548, Journal of Proceedings of the City Council, June 22, 1927.) The amending ordinance, while not mentioning the subway in Yates avenue, tends to indicate that the original ordinance is still in effect.

Mr. John G. Drennan, Assistant Corporation Counsel, calls attention to the fact that the United States Circuit Court of Appeals has held that the failure of a railroad company to complete track elevation within the time specified, the ordinance not having provided for a forfeiture or abrogation in case of delay, does not abrogate the rights

or the duty of the railroad company provided under the ordinance. (*City of Chicago et al. v. New York, C. & St. L. R. Co.*, 216 Fed. 735.) For this reason we consider the ordinance of June 25, 1906, as effective and binding even in the absence of an extension of time.

We are informed by the Hon. Charles L. Erds, Engineer of Track Elevation, that the work on the Yates avenue subway was interrupted during the War, but was resumed in 1924; that the railroad companies are now engaged in the construction of the subway, and that the construction will be completed this season.

In conclusion may we state that while we find no ordinance definitely extending the time, we are informed that the work is being pushed forward to completion as fast as conditions will permit.

(No. 6181—March 6, 1928—R. N. L.)

CITY OR WARD YARDS, WACKER DRIVE.

The City Council has power to grant for temporary use as a City or Ward yard a portion of the third level of Wacker Drive, the grant to continue until the premises are required for use as a street and limited to the erection of temporary structures alone.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your inquiry as to the use by the Bureau of Streets, as a ward yard, of the premises on the dock level of Wacker Drive, just west of North Michigan avenue has been referred to me for reply.

This property was formerly River street and was condemned for street purposes in the Wacker Drive improvement, and the City of Chicago holds title to same in trust for the benefit of the public for the use as a street. The

cost of this improvement was paid for by a bond issue covering the amount of the public benefit and the balance by special assessment against the abutting property owners. In other words, this is a public improvement in which the public have an interest and a right to use, subject to the right of the City to regulate.

The part of Wacker Drive in question, the dock level, is a third level. The first level being the street that connects with the upper level of Michigan avenue, the second level being the street that connects with the second level of Michigan avenue and on account of the grade necessary to connect with these levels, there is the dock or third level. On this level there is approximately 120,000 square feet that is reached by ramps and stairways. This level is not used as part of the highway, as it runs into a blind wall at Michigan avenue and is not a means or highway of travel and is not used by the public as a highway or street.

This level being a "dock level" or landing is governed by the decision of the Supreme Court in the case of *Chicago, Rock Island and Pacific Railway Co. et al. v. People ex rel. John Dailey, State's Attorney, et al.*, 222 Ill. 427, in which the court held that a public landing or levee dedicated to a City is held by it in trust for the benefit of the public, the same as it holds public streets, and further that the City cannot convey or encumber the streets as long as they are a public street. Further, that they cannot grant in them any easement not of a public nature and the entire street must be ever maintained for public use.

The authority of the City Council in the matter in question is governed by the case of *Chicago Cold Storage Company v. People*, 224 Ill. 290, in which the court holds: "That there is no question but that the title to sidewalks is vested in the city in trust for the use of the public,

and under section 1, article V of the Cities and Villages Act, they are under the control, supervision and dominion of the City Council.”

In *Field v. Darling*, 149 Ill. 556, the court holds that the municipality, in respect to streets, is a trustee for the general public and holds them for the use to which they are dedicated. (Wacker Drive was condemned for use of streets.) The court further holds that a street is not only public but that it is public in all its parts for free and unobstructed passage.

In the case of *Pennsylvania Company v. City of Chicago*, 181 Ill. 289, the court held: “That all public highways, from side to side and from end to end, are held for the use of the public and no other safe rule can be adopted.”

Elliott on Roads and Streets, page 478, uses this language: “Any permanent structure or purpresture which materially encroaches upon a public street is a nuisance *per se* and may be abated.”

In view of the fact that this part of Wacker Drive desired to be used is closed at the east end and is not used by the public as a highway and the “*temporary*” use of same by your department will not interfere with public use, as the contemplated use is for a municipal purpose, in our opinion, this part of Wacker Drive can be used temporarily by the Commissioner of Streets as a ward yard, until such time as this level is cut through under Michigan avenue, thereby making it a continuous street, which I understand is contemplated in the future. Such a right of the Council to grant to individuals or corporations a temporary use of a public street for such a time and in such a way as not to interfere with public use is fully set down in *Hibbard, Spencer, Bartlett and Company v. City of Chicago et al.*, 173 Ill. 96, where the court held:

“Whilst it may grant individuals or corporations a *temporary use* for such time and in such way as not to interfere with public use, yet there is no power in the municipality to sell or grant for private use a public street and exclude the public therefrom.”

Further, a permanent encroachment upon a public street for a private use is a purpresture and is, in law, a nuisance.

Therefore, in our opinion, the City Council can grant a temporary use of this third level of Wacker Drive for a City Yard, until such time as the premises in question become necessary as part of the street or the use of same will interfere with the public use as a street. Also, that no structure can be erected on the premises in question that are of a permanent nature.

(No. 6182—March 6, 1928—G. F. M.)

PENSIONS, HOUSE OF CORRECTION EMPLOYEES.

Any House of Correction employee below 50 years of age who is not a temporary probationary or 60-day employee, and any employee of 50 years of age or older who has served 10 years in the House of Correction as an employee may become a beneficiary of the Pension Fund.

Mr. P. M. Flanagan, Pension Fund Clerk, House of Correction:

Complying with your request for an opinion as to “the age limit of men employed since 1911 at the House of Correction to become members of House of Correction Employees’ Pension Fund,” the following is submitted:

Section 2 of the Act creating a pension fund for employees of houses of correction in cities having a population exceeding 150,000 inhabitants (Smith-Hurd’s Statutes, 1927, page 1522) provides that the term “employee”

under this Act shall include all persons in the employ of any such house of correction under and by virtue of the Civil Service Act, excepting temporary or probationary employees, or "sixty-day employees," or any employee who is fifty or more years of age at the time the Act is in force and effect and who at said time has not been in the service of such House of Correction for at least ten years. This section further provides that the Act shall apply only to those employees who voluntarily accept and agree to comply with its provisions.

Section 9 of the same Act provides that any person who has been an employee of said House of Correction for a period of twenty years or more and has contributed to the Pension Fund for a period of not less than twenty years, or who shall pay into the fund the equivalent of twenty years' contribution thereto, may retire from the service upon sixty days notice to the Board of Trustees (unless such notice is waived by said Board of Trustees) and become an annuitant under the Act after July 1, 1916.

There does not appear to be in this Pension Fund Act any limitation as to the age at which an employee of a House of Correction may become a beneficiary of the Pension Fund other than the provision contained in section 2 of the Act.

I am of the opinion that any employee of the House of Correction (excepting temporary, probationary and "sixty-day employees") can become a beneficiary of the pension fund while such employee is less than fifty years of age, and that any such employee fifty years of age or older may become a beneficiary after he has served ten years as such employee, pursuant to the provision of section 2 of the Act.

(No. 6183—March 7, 1928.)

1 CONTRACTS, SPECIFICATIONS, RIVER STRAIGHTENING

In letting contracts for the City the specifications must be final and prepared in such manner that all bidders are placed upon an equality in bidding; and if the specifications when prepared will likely require substantial changes they are not a sufficient basis for valid bidding. Thus the specifications for river straightening are not final and a sufficient basis for bidding and a valid contract so long as there is pending before the Illinois Commerce Commission questions whose final answer might materially effect the improvement.

2 ADVERTISEMENT FOR BIDS, ACCEPTANCE OR REJECTION, DELAY NOT AUTHORIZED.

Under an advertisement for bids which reserves the option to accept or reject them within a definite time, an award must be made within the time specified and cannot be delayed until a certain contingency takes place such as the final determination of the matter before the Illinois Commerce Commission affecting the subject matter of the bids.

Hon. Richard W. Wolfe, Commissioner of Public Works:

You have asked for advice concerning the proper course for you to pursue with reference to a contract to be let for the straightening of the River, in pursuance of an Ordinance of the City Council passed July 8, 1926, as supplemented by the Ordinance of July 25, 1927.

It appears that the specifications were drafted and that an advertisement was duly published calling for bids to be submitted on February 6, 1928; that the terms of the bidding required that such proposals were to be made out upon a blank prepared by you and accompanied by a large deposit, either in money, or in the shape of a certified check; and that the instructions to bidders stated that the Commissioner of Public Works will accept in writing one of the proposals made or reject all proposals within thirty days from the date of opening them. The statement is also made in the instructions to bidders that if the pro-

posals of any bidder is not accepted by the City of Chicago within forty days after the date of opening proposals, the money on deposit will be returned to the bidder.

From the above, it is clear that you are bound to act without delay. If it were possible to wait until such time as the Illinois Commerce Commission could enter an order finally disposing of the application of the railroad companies for permission to carry out their obligations under the terms of their agreements with the City, the award might be made; but, inasmuch as the specifications fix a time limit which expires on this date, you are unable to proceed without assuming that the Illinois Commerce Commission will enter a final order in accordance with an informal preliminary announcement of future favorable action. In point of law the application of the railroads is still pending before the Illinois Commerce Commission and the final determination of the question before that Commission may be delayed.

Section 8 of the River Straightening Ordinance authorizes the Commissioner of Public Works to "make, let and enter into any and all contracts necessary for the construction of the proposed new channel, including excavating the same, constructing dock-walls and their appurtenances and filling the old channel and all other physical work of every nature whatsoever involved in or necessary to the alteration of the channel of the river."

It is plain that the method of contracting must be that prescribed by Statute and by the general ordinances of the City, since no special method of contracting has been provided for by the River Straightening Ordinance.

Section 50 of article IX of the Cities and Villages Act provides that any work or other public improvement, except that which is provided for in whole or in part by a

special assessment, when the expense thereof exceeds \$500, shall either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance, or it may be entered into by the proper officer without advertising for bids by a vote of two-thirds of all of the aldermen, or by day labor.

The ordinances of the City contain a large number of special provisions which must be followed by the officer who lets a contract for the City. It is not necessary for the purposes of this opinion to detail at length the provisions of the ordinances with respect to the letting of contracts. Under these ordinances it is essential that the specifications must be prepared in such manner that all bidders are on an equality in bidding. This would be the rule even if the ordinances did not specifically require it. It would be unlawful under the Statute to let a contract without placing all bidders on the same plane.

You are, therefore, confronted with a situation which might lead to unexpected and perhaps serious complications and disastrous results if you proceed to let this contract before the Illinois Commerce Commission has taken formal definitive action in the matter. It is possible that, after such final action has been taken by that body, it may be necessary to change the specifications and to vary the contract in some material way in order to comply with such order. Changes might be required by the Commission. If that happens, the actual work to be done may be essentially different from the requirements under the specifications as they now exist and as they were originally submitted to the prospective bidders.

It should be remembered that the improvement in question is one of great magnitude and involves not only the rights of the railroads and of the bankers who will finance the improvement but of the public as well. All these

must have an opportunity to be heard with respect to the order that is finally to be entered by the Illinois Commerce Commission.

There is even serious doubt as to the right of an officer of a municipality to let a contract which cannot be carried out until some official body has acted in pursuance of the authority vested in it by law. The Illinois Commerce Commission has wide powers. It may, even after it has made an announcement such as is reported, alter its views and withhold its consent until more or less radical changes have been agreed upon by the respective parties. Hence, the basis for letting the contract is not so well established that you can proceed with the certainty which the law requires.

I am, therefore, of the opinion that the law, as well as every consideration of prudence and public policy, demands that the letting of this contract shall be deferred until you can advertise for bids and let the contract in conformity with the conditions contained in the final order of the Illinois Commerce Commission.

My advice is that the bids heretofore received by you should be rejected for the reasons herein stated.

(No. 6184—March 12, 1928—J. G. D. et al.)

1 PRISON LABOR, EMPLOYMENT.

Prison labor may be used by the City for the construction of a dog pound at the Bridewell.

2 CONSTITUTION OF 1870.

Separate Section 4 prohibiting the employment of convict or prison labor does not apply to such labor when used at the Bridewell for the construction of a dog pound.

Hon. Samuel A. Ettelson, Corporation Counsel:

History discloses that from time immemorial prisoners have been used as laborers by the authorities having con-

trol over them. This has always been a practice in the State of Illinois, with the limitations imposed upon the State and its institutions by the amendment to the Constitution of 1870 in 1885, which is as follows:

“Separate Section 4. Hereafter it shall be unlawful for the commissioners of any penitentiary, or other reformatory institution in the State of Illinois, to let by contract to any person, or persons, or corporation, or corporations, the labor of any convict confined within said institution.”

Section 506, chapter 24, page 401, Cahill's Statutes 1927, among other things provides:

“The city council or board of trustees of any such cities or villages shall have power to provide by ordinance that every person so committed shall be required to work at such labor as his or her strength will permit, within and without such prison, workhouse, house of correction or other place provided for the incarceration of such offenders, not to exceed ten hours each working day; and for such work the person so employed, or worked shall be allowed, exclusive of his or her board, the sum of fifty cents for each day's work on account of such fine and costs.”

Section 2263 of the Chicago Municipal Code 1922 (Ettelson), provides:

“It shall be the duty of said superintendent to receive into the said house of correction such persons as may be committed thereto by any court or magistrate in Cook County authorized by the laws of the state or by any ordinance of the city, or any town or village in Cook County having a contract with the city for the care of its prisoners to commit prisoners to such house of correction, and to put each of such persons so committed as are able to labor to the work which they are respectively best able to do, not to exceed ten hours for each working day. Every person committed to the house of correction by a judge of the Municipal Court for a violation of any city ordinance shall be allowed, for each day's

work, exclusive of his or her board, the sum of fifty cents, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

We are, therefore, of the opinion that the City has the right to use Bridewell prison labor for the construction of a dog pound.

(No. 6185—March 14, 1928—G. F. M.)

BENEFIT FUND, DUTY DISABILITY, COMPUTATION.

Duty disability must be computed upon the salary received at the time of the injury.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the disability benefit to be awarded a policeman injured November 24, 1925, and whose application for disability benefit is now pending, the following is submitted:

Your letter states that Patrolman Patrick J. O'Shea was injured November 24, 1925, and that his salary at that time was \$183.32 a month; that he was last paid by the Police Department February 1, 1928, at a salary of \$208.33; and that he contends that the benefit to be paid him should be based on last rate of salary he received.

Section 45 of the Policemen's Annuity & Benefit Fund Act provides, in the third paragraph thereof, that any policeman less than fifty-seven (57) years of age who shall become disabled subsequent to January 1, 1922, as the result of an injury incurred on or after said date in the performance of an act of duty "shall have a right to receive duty disability during any period of such disability for which such policeman shall not receive nor have a

right to receive salary, of an amount equal to seventy-five per cent (75%) of his salary as it shall be at the time of such injury.”

I am of the opinion that, under the above section of the Act, if Patrolman O'Shea was injured on November 24, 1925, while in the performance of an act of duty, his duty disability must be computed upon the salary he was receiving “at the time of such injury,” namely \$183.32 a month.

(No. 6186—March 16, 1928—L. H.)

PAY CHECKS, ENDORSEMENT.

A payee's endorsement on a pay check is sufficient in law without adding an address; and it would prove impracticable to require the address of the payee to be added as part of the endorsement.

Hon. Charles C. Fitzmorris, City Comptroller:

You forwarded to us copy of a pay check, showing both the name and address of the payee typewritten in the space reserved therefor after the words “Pay to the order of,” with the request to be advised whether under such circumstances the endorsement of the payee on the back without writing the address is a sufficient endorsement.

Such pay checks, drawn by one officer of a municipality on another officer in the same municipality are not negotiable instruments in the sense that the law of negotiable instruments applies in every particular to such checks. Therefore, if you see fit to establish a rule or requirement by which it will be necessary to write the address of the payee on the back under his signature you are at liberty to do so. But, we are of the opinion that such a course would be open to several serious objections. If the party

had moved it would be improper for him to put the old address under his signature and if he put his new address thereon it could not be paid without further proof of the identity of the payee. Again, many would fail to put on the address, and it would be difficult to educate the thousands of City employees on this point. Other objections might be urged showing that such a rule is not feasible or practicable.

It has been the custom to treat these checks as negotiable instruments. The law with respect to negotiable instruments requires that if the paper is issued to a person in his official capacity, or in his fiduciary capacity, the payee must add to his signature his official title or the words indicating his trusteeship. There is nothing in the law of negotiable instruments, however, which requires the payee to endorse the paper with his address, even though the address appears on the face of the instrument.

Therefore, we are of the opinion that the signature of the payee on these pay checks, in the absence of a rule requiring employees to do otherwise, will be a sufficient endorsement.

(No. 6187—March 16, 1928—A. H. V.)

BUILDINGS, MECHANICAL VENTILATION EQUIPMENT, ANNUAL INSPECTION.

A building where one or more persons are employed and which is equipped with mechanical ventilation is subject to annual inspection under sections 2153(q) and 2155 of the Municipal Code of 1922, although such a building is not specifically mentioned in article XXXV of chapter XXXIX of said Code.

Hon. Arnold H. Kegel, Commissioner of Health:

You have requested this office for an opinion relative to the right of the City of Chicago to collect Comptroller's

warrant for collection F-13551 in the amount of \$5.00 against the Chicago Surface Lines. This warrant was issued under section 2155 of the Chicago Municipal Code of 1922 to cover the cost of the annual inspection of mechanical ventilation equipment located at 2501-59 Armitage avenue, Chicago, and payment was declined by the Chicago Surface Lines on the ground that said building was classified by the Building Ordinance of the Municipal Code as a Class I building and is not included in article XXXV of chapter XXXIX of said Code.

Class I buildings are defined by article III of chapter XVII of said Code as follows:

“In Class I shall be included every building used for the sale, storage or manufacture of merchandise other than department stores as described in this chapter; also such buildings, structures, or places with a ground area of 500 square feet or more used as and for the purposes of a barn, stable or a garage, or for the housing or keeping of automobiles.”

In your letter you do not describe the character of the building and we therefore assume that the building is properly described as a Class I building.

Class I buildings are not specifically mentioned in article XXXV of chapter XXXIX. However, section 2153 (q) provides as follows:

“No person, firm or corporation, either as owner, proprietor, lessee, manager or superintendent of any factory, mill, work shop or *any other buildings where one or more persons are employed*, shall cause, permit or allow the same or any portion or department of any room in such factory, mill or work shop to be overcrowded or to have inadequate, faulty or insufficient light or ventilation.”

We assume that the premises occupied by the Chicago Surface Lines are premises which constitute a building

where one or more persons are employed. If this be the case, then it is made unlawful to furnish inadequate, faulty or insufficient ventilation.

Section 2155 provides for an annual inspection of *all* mechanical ventilation equipment in public and semi-public buildings and places of employment by the Commissioner of Health.

Assuming that the premises in question are a building where one or more persons are employed, it is our opinion that the same are amenable to section 2153 (q) of the Code, which makes it unlawful to permit insufficient ventilation to exist; that section 2155 of the Code covers the inspection of mechanical ventilation equipment in all public or semi-public buildings and places of employment; that consequently the mechanical ventilation equipment located in the premises at 2501-59 Armitage avenue is subject to annual inspection by the Commissioner of Health, and that the customary fee must be paid the City of Chicago for such inspection as provided in the ordinance.

(No. 6188—March 17, 1928—G. F. M.)

BENEFIT FUNDS, ANNUITIES, APPORTIONMENT.

At common law and under Illinois statute annuities are not apportionable except (a) where the annuity is for the support and maintenance of infants; (b) where the annuity is for the support of a wife living separate and apart from her husband; so that neither a widow nor other representative of a deceased annuitant who dies between two annuity payment periods is entitled to apportionment of his annuity.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the apportioning of an annuity of a beneficiary of the Fund who

died between two annuity payment dates, the following is submitted:

Your letter states that a City employee who had been an annuitant of your Fund, died the day before the last day of the month; that an annuity payment was payable to him on the last day of the month; and that his widow has applied for 30-31sts of the annuity of her deceased husband.

The common law is in force in Illinois, excepting where the same has been modified by statute. So far as the common law relates to annuities, it has been modified in a number of States but has never been modified or altered in Illinois, so that the common law governing annuities is still in force and effect in this State.

It has always been a uniform and unbending rule of the common law that annuities were not apportionable in respect of time, with two exceptions, viz.,—(a) Where the annuity was for the support and maintenance of infants, and, (b) Where the annuity was for the support of the wife living separate and apart from her husband. The annuity in question here does not fall within either of the two classes of exceptions.

The latest pronouncement by any of the courts of this State touching upon the rights of the representatives of a deceased annuitant to a portion of an annuity, was by the Appellate Court of Illinois in the case of *Bell v. Egelhoff*, 204 Ill. App. 618, in which the court reiterated this principle of the common law. "If an annuitant dies before the day of payment, his representative cannot claim any portion of the annuity for the current term."

In addition to the rule of law hereinabove referred to, your Honorable Body is deterred from apportioning annuities, by the very nature of the annuity payments provided for in the Act you are administering.

Section 28 of the Municipal Employees' Annuity & Benefit Fund Act provides, that all annuities shall be computed according to the American Experience Table of Mortality, and I am informed by Mr. Campbell, actuary to the Board, that the annuities payable under this Act have been based upon the assumption that a certain percentage of deaths would occur each year, and that the annuities have consequently been so graded in amount as to provide for the possible death of an annuitant before the day of payment, with the result that each annuitant received a slightly larger monthly annuity than would be the case if annuities were to be apportioned as herein sought to be done. Mr. Campbell further informs me that under the system followed in the preparation of this particular Annuity and Benefit Fund Act, the entire Fund would be thrown out of balance were annuities to be apportioned in violation of the rule of the common law, as apportionment would result in the payment of a larger amount of annuity in each case of a person dying between annuity payment periods than the accumulations of such persons were estimated or computed to purchase. As the Act now stands, were the common law rule as to annuities changed by our Legislature so as to make annuities apportionable, it would be necessary to amend the Municipal Employees' Annuity & Benefit Fund Act so as to reduce the amount of annuities now payable under that Act, in order to provide for the safety and stability of the Fund under a system of apportionable annuities.

While it may at first seem unreasonable to refuse a widow any portion of her deceased husband's annuity because he dies one (1) day before his annuity was due, this course has been followed uniformly and without exception since the present Act came into effect, and is not unreasonable when it is considered that the annuity payments of

the deceased were in a larger amount than they would have been were annuities apportionable. In any event no other course is permissible to your Honorable Body until the Courts change their decisions or the Legislature changes the law.

I am of the opinion that under the law as it now exists in Illinois, as well as under the system of computations followed in the construction of your annuity system, neither the widow nor other representative of a deceased annuitant is entitled to an apportionment of his annuity for any portion of a month during which he lived between annuity payment periods, when the annuitant dies before the day of payment.

(No. 6189—March 19, 1928—A. H. V.)

1 TRACK ELEVATION, SUBWAY, INSTALLATION OF LIGHTS.

Under a track elevation ordinance permitting a railroad company to install lights in the subway "if it so desires" an unreasonable delay to install such lights amounts to an election not to install them; but to make the election final, a written notice should be given to the railroad company that unless it shall proceed with installation of the lights within a specified time, the City will install the lights at the expense of the company.

2 RAILROAD CROSSINGS AND SUBWAYS, LIGHTING ORDINANCE.

A provision in a track elevation ordinance that lights may be installed by a railroad company "in the manner prescribed by ordinance for lighting railroad crossings in the City of Chicago" permits the City Council to pass an ordinance requiring all railroad crossings to be lighted by certain strength of electric lamp for each 400 square feet of the sidewalk and roadway and binds the railroad company to comply with the lighting railroad crossing ordinance if it is passed before the lights are installed.

Hon. Michael J. Kennedy, Commissioner of Gas & Electricity:

You heretofore addressed a letter to this Department inquiring as to the installation of lights in the subway

being constructed at 91st street and South Park avenue, and as to whether the Committee could install the lights and collect from the railroad company for the cost of installation.

We find that on April 5, 1911, the City Council passed a track elevation ordinance providing for the elevation of tracks by the Chicago & Western Indiana Railroad Company (Council Proceedings, pp. 4398-4429). Paragraph 2 of section 10 of said ordinance provides as follows:

“The railroad and railway companies mentioned are hereby required to light the subways, passage ways and grade crossings provided for in section 4a of this ordinance in the manner prescribed by ordinance for the lighting of railroad crossings in the City of Chicago. The necessary lights shall be installed and maintained in the subways by the railroad and railway companies if they so desire or by the City of Chicago under the supervision of the City Electrician, and the railroad and railway companies, beneath whose tracks such lights are placed, shall pay to the City of Chicago the actual and reasonable cost of installing and maintaining such lights and shall in like manner pay the cost of electric current used by such lights at the same rates as are paid for such current by the City of Chicago.”

Under the above quoted portion of the ordinance, the railroad company has the right to install the lights if it so desires. If it delays installing said lights for an unreasonable length of time, the City may consider such delay as an election by the railway company not to install the lights; in which event the City may proceed to install the lights and to charge the railway company for the cost of installation. You have advised us in your letter that the railroad company is delaying the installation of the lights. We suggest that you send a written notice to the railway company notifying them that it is essential to safety of pedestrians that lights be installed at once in this

subway without further delay ; that if the railway company neglects to commence the actual work of installing these lights within ten days from date of the notice, the City will proceed to install the lights and will charge the cost to the railway company.

You state that your Department has been trying to get the railway company to agree to light the subway by 100 watt lamps for each four hundred square feet of sidewalk and roadway area. The ordinance, as above quoted, provides that the lights should be installed in the manner prescribed by ordinance now in force or that may hereafter be passed, relative to the lighting of railroad crossings in the City of Chicago. If the railway company refuses to light the subway by 100 watt lamps for each four hundred square feet of sidewalk and, if it is reasonably necessary that the subway be lighted, as aforesaid, we would advise you that an ordinance should be passed providing that in all cases of railroad crossings in the City of Chicago, where there is no specific ordinance covering the particular locality, such crossing shall be lighted by 100 watt lamps for each four hundred square feet of sidewalk and roadway area. The railway company having agreed to light the subway in the manner prescribed by ordinance would then have to light the same as above set forth.

If the City of Chicago proceeds to install the lights and installs 100 watt lamps for each four hundred square feet, a new ordinance providing for the lighting of railroad crossings should first be passed, as above suggested ; otherwise, the City would only be able to collect for the cost of lighting under the old system.

(No. 6189 $\frac{1}{2}$ —March 19, 1928—F. J. V.)

1 COLD STORAGE WAREHOUSE ORDINANCE.

Article XXII of Ettelson's Municipal Code of 1922 is inoperative and invalid on account of existing state legislation on the same subject.

2 CONSTITUTIONAL LAW, MUNICIPAL AND STATE REGULATIONS, CONFLICT.

Municipal regulations yield to the general laws of the state on the same subject, whenever there is a conflict between them.

3 LICENSE, COLD STORAGE WAREHOUSES.

It is within the power of a municipality to regulate and license cold storage warehouses under clauses 66 and 78, section 1, article V of the Cities and Villages Act, as cold storage affects public health; but such license and regulation is inoperative and invalid if in conflict with state legislation on the same subject.

4 LICENSE, IMPLIED POWER.

The power to license and regulate may be implied from a general grant of power.

Messrs. Albert H. & Henry Veeder, Chicago, Illinois:

We have for answer your communication in behalf of your client, the Illinois Cold Storage Company, in the matter of the collection, by the City, of fifty-six dollars (\$56.00), under warrant number F-10130, for the annual inspection fee for cold storage warehouse for issuance of a certificate of registration for the period September 1, 1927, to August 31, 1928 (inclusive) as required by section 2031 of the 1922 Municipal Code of Chicago.

Your contention is that section 2031 of the Ettelson Municipal Code of 1922 is invalid on two grounds: (1) That no power has been delegated to the City to license or regulate cold storage warehouses; (2) That the State by legislative enactment of 1917 fully provides for licensing, regulating and inspecting cold storage warehouses. You cite the case of *Lowenthal v. City of Chicago*, 313 Ill. 190, to

sustain both propositions. You ask that we kindly advise if we do not concur in your views.

It is true of cold storage warehouses, as is said of drug stores in the *Lowenthal case*, that "the Legislature has not, in so many words, conferred upon the City the right to regulate or license (cold storage warehouses)." But the power to license and regulate may be delegated by necessary implication from general grants of power as well as by express terms of such grants. There are numerous instances of the exercise of police power by license and regulation ordinances where the delegation of such power is not to be found in express terms, but which ordinances are sustained by virtue of the general grants of power in clauses 66 and 78 of section 1 of article V of the Cities and Villages Act, known respectively as the police power and public health clauses. Thus in sustaining an ordinance, licensing and regulating laundries, it is said in the case of *Moy v. City of Chicago*, 309 Ill. 342, at page 244:

"The ordinance is clearly a health regulation, and the City had authority, under paragraph 78 of the same section (1 of art. 5, Cities and Villages Act) to pass the ordinance. That paragraph provides that the City shall have power 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' This clause gives the City the power to compel any owner or occupant of a building to keep it in a sanitary condition and to conduct his business so that it will not endanger the health of the employees or of the public. (*City of Chicago v. Pettibone & Co.*, 267 Ill. 573.) We have held that the City has authority, under this provision, to regulate the conduct of bakeries (*City of Chicago v. Drogasawacz*, 256 Ill. 34) and the distribution of milk. (*Koy v. City of Chicago*, 263 Ill. 122.) Under paragraph 66, which gives cities the power to 'pass and enforce all necessary police ordinances,' the city council is given authority to pass this ordinance to carry out the purposes of paragraph 78."

In the *Lowenthal* case the Supreme Court said: "There is nothing about the conduct of a drug store requiring supervision which is not common to all stores where prepared foods and drinks are sold in packages or where stationery or other merchandise is sold." (p. 195.) But there is a marked distinction between a drug store and a cold storage warehouse as affecting the public health. We believe, on the authority and reasoning of *Moy v. City of Chicago*, *supra*, that clauses 66 and 78 of section 1 of article V of the Cities and Villages Act sustain the ordinance for licensing, regulating and inspecting cold storage warehouses, as against your first proposition that there is no delegation of power to the City Council to adopt such ordinance. Things which may or may not be injurious to the public, according to the manner in which they are managed, conducted and regulated, may be licensed for the purpose of regulation. *Condon v. Village of Forest Park*, 278 Ill. 218; *City of Chicago v. Murphy*, 313 Ill. 98.

It was decided, in the case of *North American Cold Storage Company v. City of Chicago*, 151 Fed. 120, that a "municipal ordinance passed under State authority, providing for the inspection of food products, kept within the City in storage or for sale, and authorizing the summary seizure and destruction of any 'putrid, decayed, poisoned and infected' articles of food found on such premises, is well within the police powers of the State, which are not affected by the fourteenth amendment to the Federal Constitution."

Although we believe the ordinance is otherwise valid, we are obliged to concur with you in your second proposition to the extent that the cold storage warehouse ordinance (Article XXII, Ettelson's Municipal Code of 1922, p. 611) is inoperative and cannot be enforced in the face of existing State legislation on the same subject-matter.

The police power delegated to municipal corporations is not exclusive of that retained by the State. That is, municipal regulations must yield to the general laws of the State, enacted under the same power, whenever there is a conflict between them. Black's Constitutional Law, p. 391, section 153. This principle of constitutional law and the following decisions of the Supreme Court are directly in point in establishing the proposition that in this case the existing State legislation must supersede and therefore render invalid and inoperative the ordinance under consideration, namely: *Lowenthal v. City of Chicago*, 313 Ill. 190; *City of Chicago v. Burke*, 226 Ill. 191.

In the *Lowenthal* case the court, after enumerating certain State laws applying to the regulation and licensing of drug stores, said:

"In addition to the specific qualifications required of those operating drug stores, there are definite State regulations concerning the dispensing of harmful drugs only upon physicians' prescriptions, so we think the conduct of the drug business, so far as it requires regulation, is covered by State regulation."

For this reason, as well as that there is nothing about the conduct of drug stores which is not common to all stores, the court, in this case, held invalid the ordinance which sought to license and regulate drug stores.

In the case of the *City of Chicago v. Burke*, *supra*, it was expressly decided that:

"By the act of 1874, relating to oil inspection, (Rev. Stat. 1874, p. 731), the Legislature has resumed control over the subject and has taken away the authority of municipal corporations to legislate thereon under section 2 of article 6 and paragraph 54 of section 1 of article 5 of the City and Village Act of 1872."

Here is a case of an express grant of power to the City to inspect oil, which is held invalid and inoperative to

sustain an ordinance as against the State's legislation on the same subject matter.

So the cold storage ordinance in question, which would be valid by virtue of the public health and police power clauses of the Cities and Villages Act, must become inoperative and invalid by reason of the exercise of the same police power by the State itself. The Cold Storage Act of 1917 (Cahill's Stat., 1927, ch. 56 b, sec. 118, p. 1324) which covers the subject matter and general provisions respecting cold storage warehouses, necessarily supersedes the ordinance under consideration. If any doubt remained as to the legislative intent, it must be dispelled by sections 13, 14 and 15, which provide (1) that "This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it;" (2) that "This Act may be cited as the Uniform Cold Storage Act;" and (3) that "All Acts and parts of Acts inconsistent with this Act (are) hereby repealed." Such uniformity would be impossible with concurrent and conflicting City ordinances on the same subject.

This relation between the State and its municipalities in the matter of the exercise of the police power which has been delegated to the municipalities, is similar to the relation which exists between the Federal and State Governments on the subject of concurrent powers, such as that in bankruptcy legislation. The power of Congress to enact uniform laws on the subject of bankruptcy does not deprive the States of the power to pass laws dealing with the same subject when there is no national bankrupt law in existence. But as soon as Congress adopts a measure of this character all the State laws relating to bankruptcy or insolvency are thereby superseded and sus-

pended until the National law shall be repealed. Black's Constitutional Law, page 260.

We are of the opinion, therefore, that the ordinance in question and the collection of the licensee fee thereunder, cannot be sustained.

(No. 6190—March 26, 1928—A. H. V.)

CITY GOVERNMENT, BILLIARD COMMISSION.

The "Billiard Commission of the City of Chicago" is part of the administrative government of the City and consists of the Mayor, the Superintendent (Commissioner) of Police and the members of the Committee on Police Relations. This Commission was created by and derives its powers from sections 329-350 of the Municipal Code of Chicago of 1922; which sections of the Code are still in force and effect.

Hon. Charles C. Fitzmorris, Comptroller:

You have heretofore requested an opinion from this Department relative to the status of the Billiard and Athletic Commission. You asked to be advised as to the function of the Commission; whether the Commission is a Committee of the City Council; who is the directing head of the Commission; whence does it derive its authority; and is the Commission legally in existence any longer.

We shall reply to your questions in the order in which you ask them.

An appropriation was made for the Billiard and Athletic Commission in the 1927 budget, providing a salary of \$2,400 for the Secretary; \$100 for furniture and fixtures; \$200 for printing, etc.; \$1,700 for investigation; \$150 for expenses of the Commission; and \$100 miscellaneous, making a total appropriation of \$4,650. The 1928 budget makes similar appropriations except that the amount ap-

propriated for investigations has been increased to \$5,000, making a total of \$7,950 appropriated.

The function of the Commission is, under the supervision of the Commissioner of Police, to pass upon the qualifications of applicants for licenses to operate a billiard room within the City and to make all necessary rules and regulations for the investigating of applicants and for the granting of licenses. The Commission is required to keep a register of the name and location of the place of business of each person, firm, corporation, club or association licensed by it, together with the license number and the date and complete record of inspections and investigations made. The Commission is required to maintain a constant vigilance over all public billiard rooms and see that the owners are at all times complying with the ordinance. The Commission is required to notify the Superintendent of Police whenever a license is suspended or revoked. Chicago Municipal Code of 1922, sections 329-350.

The Commission is not a Committee of the City Council, but is a Commission which is a part of the administrative government of the City. Section 329 of the Chicago Municipal Code of 1922 was amended May 2, 1923, to read as follows:

“There is hereby created a Commission to be known as the Billiard Commission of the City of Chicago. The said Commission shall consist of the Mayor, Superintendent of Police and the members of the Committee on Public Relations and Athletics of the City Council. The members of such Billiard Commission shall serve as such without compensation and they shall not be entitled to receive any pay out of the City Treasury for expense incurred in performance of any duty as members of the same. There is also created the office of the Secretary of the Billiard Commission. The salary of the Secretary of such Billiard Commission shall be fixed by the City Council.”

The ordinance does not provide for any directing head of the Commission. Consequently, each member of the Commission is entitled to a vote in determining the policies of the Commission and the majority vote controls.

The Commission is created by the City Council and derives its authority from the ordinance creating it. Chicago Municipal Code of 1922, sections 329-350.

The Commission is legally in existence and will continue to be so until the ordinance creating it has been repealed.

(No. 6190 $\frac{1}{2}$ —March 27, 1928—F. J. V.)

1 FIRE DEPARTMENT, LIEUTENANT AND CAPTIAN, MERGER.

The office of lieutenant in the Fire Department can be merged into that of captain by omitting through an amendment of the annual appropriation bill of the office of lieutenant and providing for as many captains as there are lieutenants and captains in the department, thereby making the existing lieutenants eligible to the position of captain without a promotional examination.

2 CIVIL SERVICE, LIEUTENANT AND CAPTAIN, PROMOTIONAL EXAMINATION.

Lieutenants in the Fire Department may become captains only through promotional examination, the position of lieutenant being lower in rank than that of captain, unless the office of lieutenant is merged into that of captain by amending the annual appropriation bill.

3 OFFICES AND OFFICERS, LIEUTENANT AND CAPTAIN, FIRE DEPARTMENT.

The positions of lieutenant and of captain are created under the annual appropriation bill by virtue of general authority given in Municipal Code of 1922 as amended and referring to the organization of the fire department.

4 CIVIL SERVICE, MERGER OF OFFICE, ORDINANCE.

The merger of two offices in one, such as lieutenantancy into a captaincy may be done by abolishing the lieutenantancy and providing by ordinance for the position of captaincy alone.

5 CIVIL SERVICE, CLASSIFICATION AND REGRADING.

The Civil Service Commission alone, as the executive branch of municipal government, has the power to classify and regrade offices, places and positions in the civil service as the Commission finds them created, existing and defined by ordinance; but the Commission has no power to regrade lieutenants in the Fire Department into captaincies without a promotional examination.

6 CIVIL SERVICE, CITY COUNCIL, CLASSIFYING AND REGRADING OFFICES.

The City Council, as the legislative branch of the city government, has power to create and abolish offices, positions and places of employment in the civil service, but it has no power to regrade or classify them; nor has it power to direct how existing places in the civil service should be classified and regraded by the Civil Service Commission.

*Hon. John J. Hoellen, Chairman, Committee on Schools,
Fire and Civil Service:*

In your official communication of the 22nd instant, you state that there is an order pending before your Committee directing that the necessary action be taken to re-grade the lieutenants in the fire department to the grade of captain. You also state that you were directed to request (the law department) to furnish the Committee with an opinion as to whether it is legally possible to re-grade the lieutenants in the fire department to the rank of captain without requiring the lieutenants to submit to a civil service promotional examination.

It seems from your communication that the Committee assumes that it has the power by its own order, or that of the Council, to direct the re-grading of lieutenants and captains to the grade of captain. Neither the Committee nor the City Council itself has such power. The City Council as the legislative branch of the City Government may create and abolish offices, positions and places of employment in the civil service. The Civil Service Commission, as an arm of the executive branch of the government, alone classifies and re-grades offices, positions and places of

employment as directed by the Civil Service Law. In the work of classifying and re-grading of civil service places the Civil Service Commission is governed solely by the places in the service as the Commission finds them created, existing and defined by the City Council's ordinances. Not even by direction of the City Council contained in such ordinances has the Council the power to direct how the existing places in the service shall be classified and graded by the Civil Service Commission, the Commission being the sole judge as to how such classification and re-grading shall be made.

To bring about the suggested merging of the present positions of captain and lieutenant in the civil service the Council must abolish the position of lieutenant and provide by ordinance for the position of captain alone.

By chapter XXIX of article I of the Chicago Municipal Code of 1922, as amended by ordinance of May 21, 1924, captains and lieutenants are no longer named as offices or positions in the fire department as such department is now established. These two positions are authorized by that part of the above ordinance which provides that the fire department shall include, in addition to the offices named, "such other employees as shall be provided for in the annual appropriation bill."

The last appropriation bill contains the following provisions:

51-A-2	Captain,	184	at	\$3,200.00
51-A-3	Lieutenant	211	at	2,900.00.

As thus created it is obvious that the two positions of "captain" and "lieutenant" are entirely different both in name (captain always recognized as higher than lieutenant) and in salary. It would therefore be impossible to re-grade these positions as they now exist under the City's appropriation ordinance to that of captain. The Civil

Service Commission itself could not legally do so nor could the Council by order or ordinance confer any such power upon the Commission.

By virtue of the Civil Service Act and the rules of the Civil Service Commission adopted pursuant to such Act, and the decisions of the Supreme Court, the position of lieutenant is lower in rank to that of captain, and the position of captain is a promotional one which can be attained by the lieutenants only through a promotional examination, so long as the two positions continue thus to exist under the ordinance.

In the recent case of *People ex rel. Clark v. Finn et al.*, No. 417821, in the Superior Court of Cook County, the lieutenants in command of fire companies demanded the right to participate with captains in the promotional examination for chief of battalion in the fire department. Solely on the issue of law raised by demurrer the court sustained our contention, as above stated, that lieutenants in command of fire companies were not the same in civil service rank as captain and the two could not participate in the promotional examination for battalion chief, which under the law is limited to captains alone as constituting the next lower in rank to that of battalion chief. The opinion of this department directed to Honorable A. Sprague, Commissioner of Public Works, September 23, 1925 (Opinions of the Corporation Counsel, 1925-1926, p. 326), is important on the proposition here involved. In that opinion we took occasion to say:

“To permit employees in the next lower *grade* of the civil service to take a promotional examination who are necessarily two ranks lower in classification than the position of chief clerk, in company with or to the exclusion of the assistant chief clerks who are in the next lower rank to the position of chief clerk, is clearly illegal and invalid. To this effect was the

recent decision of the Superior Court of Cook County (Judge Mangan, presiding) in the case of lieutenants in command of fire companies who demanded the right to participate with captains in the promotional examination for chief of battalion in the Fire Department. See *People ex rel. Clark v. Finn et al.*, No. 417821." *People v. Errant*, 229 Ill. 64, 65.

As the positions of captain and lieutenant now exist and are defined the Civil Service Commission cannot regularly "re-grade the lieutenants in the fire department to the grade of captain," so as to dispense with the promotional examination which lieutenants must take to become captains, and so as to entitle such lieutenants to participate with captains in the promotional examination or the higher position of battalion chief. On this point what we had to say in our official opinion above cited is important and we quote from such opinion as follows:

"The test of eligibility to try for promotion in the civil service is plainly prescribed by section 9 of the Civil Service Act as follows: 'All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.' The right here given to every member of the next lower rank, engaged in the same line of service, is given in language so plain and unequivocal as to admit of no possible construction by any court or commission that would in any degree limit or circumscribe that right. It is not within the power of the Civil Service Commission itself by rule or administrative act nor in the appointive power by delegation of authority from the Commission, to deprive the civil service employee of this right. Any such rule or act of the Commission, or delegation of authority would be illegal and void under the Civil Service Act. *People ex rel. Kaster v. Kearney, Com.*, 164 N. Y. 14, 58 N. E. 64; Opinion No. 680, Com. of Pub. Wks., of date Dec. 9, 1924."

The proposition to merge the position of lieutenant in the fire department with that of captain is the same as

that which applied to the recent merging of the positions of fire engineers and assistant fire engineers. The latter positions were merged by the City Council by amending the annual appropriation bill so as to provide for as many fire engineers as there formerly were fire engineers and assistant fire engineers thereby abolishing the position of assistant fire engineer. In the same manner the City Council may effect merger of lieutenants and captains in the fire department. By so doing the present lieutenants would automatically become captains without the necessity of taking the promotional examination that they would otherwise be required to take. This procedure and the law governing the same in its effect upon the Civil Service Commission's duties in re-grading the positions and in the matter of the rights of the lieutenants is fully set out in a recent opinion of the law department dated January 23, 1928, and directed to Honorable A. W. Goodrich, Fire Commissioner. We are appending hereto a copy of such opinion for the Committee's information and guidance.

(No. 6191—March 27, 1928—R. N. L.)

1 DOCK LINE, ESTABLISHMENT, ORDINANCE.

A dock line is established by concurrence in the report of the Committee on Harbors, Wharves and Bridges and the passage of an ordinance therewith submitted.

2 DOCK LINE, DISCREPANCY, CORRECTION.

In case of a discrepancy in an established dock line, the City Council has power to create a new dock line by ordinance and the acquisition by purchase or condemnation of property necessary to correct the discrepancy.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your inquiry of recent date relative to the dock lines established by ordinances passed November 13, 1905, and April 4, 1912, respectively, has been given to me for reply.

The ordinance of 1905 first appears in the Council Proceedings of October 30, 1905, page 1373. On page 1490 of the Council Proceedings of November 13, 1905, there appears the following:

“The clerk on motion of Alderman Ryan presented the report of the Committee on Harbors, Wharves, and Bridges, on order, for an ordinance to establish dock lines on North branch of Chicago River abutting certain lots in Sheffield’s addition, deferred and published October 30, 1905, page 1373. Alderman Ryan moved to concur in the report and pass the ordinance therewith. The motion prevailed, and the ordinance was passed by yeas and nays as follows: Yeas 60, Nays 0.”

This ordinance established the Northeasterly dock line of the North branch of the Chicago River abutting and along the premises known as lots 29, 30, 31 in block 1 of the subdivision of lots 1 and 2 in block 8 of Sheffield’s Addition to Chicago. The description of the property in question is as follows: “Beginning at a point on the lot line of said lot 29 on the Southerly side thereof 212 feet Southwesterly from the stake at the corner of said lot 29 and Hawthorne street, thence in a Northwesterly direction in a straight line to a point on the lot line of said lot 29 on the Northerly side thereof 218 feet Southwesterly from Hawthorne street, thence in a Northwesterly direction in a straight line to a point on the lot line of said lot 30 on the Northerly side thereof 226 feet Southwesterly from Hawthorne street, thence in a Northwesterly direction in a straight line to a point on the lot line of said lot 31 on the Northerly side thereof, 244.5 feet Southwest from the stake at the corner of said lot 31 and Hawthorne as shown by the tax plat, said dock line to be and the same is hereby made and established on the Southwest boundary of said three lots and coinciding and co-extensive therewith, as shown on said plat.”

I find that said ordinance was passed according to the statutes governing the passage of ordinances and the same is a valid ordinance.

The Statute grants to the City Council the power to deepen, widen, dock, cover, wall, alter or change the channel of water course. Sub-division 30, section 1, article V, of the Cities and Villages Act.

Relative to the discrepancy of 15 feet in the position of the dock line at the Northerly line of lot 28, block 1, as established in the Ordinance of April 14, 1912, and the means by which the City may correct this discrepancy, I beg to state further that under the above subdivision 30, section 1, article V of the Cities and Villages Act as aforesaid, the City Council has the right to establish a new dock line to meet this discrepancy, but that part necessary to be taken must be either purchased or condemned and the owner of the property which is necessary to correct this discrepancy must have just compensation for his property.

In the case of *City of Chicago v. Van Ingen*, 152 Ill. 624, the City had granted a riparian owner a permit to build a dock in front of his land indicated in appellee's map as the "permit dock line," which cut off about 20 feet of his land on the river front. Appellee had done considerable work, but he was stopped by the City; he finally appealed for an injunction which was granted, and later on made perpetual. On appeal by the City the decree was sustained. In this case the Supreme Court after confirming its former decision on the rights of riparian owners, says:

"No question as to the right of the city to establish a dock line at the place contended for, and widen the channel of the river so as to take in the intervening land, under the general powers granted in the Cities and Villages Act * * * without making just compensation to appellee, is presented upon this record.
* * * In respect to such rights, as in all cases where

private property is sought to be taken for public use, the owner cannot be divested thereof without just compensation being first made." 152 Ill. 624, 635.

"Private property shall not be taken or damaged for public use without just compensation." Constitution 1870, article 2, section XIII.

In *Yates v. Milwaukee*, 77 U. S. 497, 507, the Supreme Court of the United States says:

"If the authorities of the City of Milwaukee deem its removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use."

I find from examination in the records of the Board of Assessors that the owner of this property is paying taxes on the full depth as outlined in the ordinances.

Therefore, in our opinion, the Ordinance of November 13, 1905, establishing said dock line is legal, and in order to correct the discrepancy between this dock line and the dock line established April 4, 1912, it will be necessary for the City of Chicago to establish a new dock line by an ordinance and then acquire the property needed by purchase or condemnation.

(No. 6192—March 28, 1928—A. H. V.)

1 TRACK ELEVATION, JURISDICTION.

Since the enactment of the Act of 1921 concerning public utilities the power to require railroad companies to elevate their tracks resides in the Illinois Commerce Commission and not in municipalities as theretofore; and agreements relating to track elevation should receive the approval of that Commission.

2 CITIES AND VILLAGES ACT.

Clauses 25 and 27, section 1, article 5 of the Cities and Villages Act, insofar as they confer authority upon municipalities to compel railroad companies to elevate their tracks have been modified by the Act concerning public utilities of 1921.

Hon. John Toman, Chairman, Committee on Track Elevation:

You have requested this office for an opinion as to whether or not the City of Chicago has power to compel the railroad companies to elevate their roadbed and tracks within the corporate limits of the City, and, if the City has no such power, as to what body has the power to compel such elevation.

Prior to the Act creating the Illinois Commerce Commission (approved June 29, 1921, in force July 1, 1921), the law was settled that cities had power to order railroads to elevate their tracks. Paragraphs 25 and 27 of article V of the Cities and Villages Act provide as follows:

“25th. To provide for and change the location, grade and crossing of any railroad.

“27th. To require railroad companies to keep flagmen at railroad crossings of streets and provide protection against injury to persons and property in the use of such railroads; to require such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by said city, and where such tracks run lengthwise of any such street, alley or highway, to keep their rail-

road tracks on a level with the street surface and so that such tracks may be crossed at any place on such street, alley or highway; to compel and require railroad companies to make and keep open and to keep in repair ditches, drains, sewers and culverts along and under their railroad tracks, so that filthy or stagnant pools of water cannot stand on their grounds or right-of-way, and so that the natural drainage of adjacent property shall not be impeded."

The Supreme Court of Illinois had sustained the grant of power to cities to order railroads to elevate their tracks by decisions rendered prior to the passage of the Act creating the Illinois Commerce Commission. *Murphy v. C. R. I. & P. Ry. Co.*, 247 Ill. 614; *Weige v. C. & W. I. R. R. Co.*, 227 Ill. 421; *People v. Grand Trunk Ry. Co.*, 232 Ill. 292; *People v. A. T. & S. F. Ry. Co.*, 217 Ill. 594; *Chicago v. P. C. C. & St. L. Ry. Co.*, 244 Ill. 220; *Summerfield v. City of Chicago*, 197 Ill. 270; *City of Chicago v. Jackson*, 196 Ill. 496; *Osborn v. City of Chicago*, 105 Ill. App. 217.

There was approved on June 29, 1921, in force July 1, 1921, an act entitled, "An Act concerning public utilities," which Act created the Illinois Commerce Commission and purported to transfer to the Illinois Commerce Commission quite general supervisory power over railroads and other public utilities. This Act contains provisions in great detail relative to the elimination and relocation of grade crossings, and power is given the Commission to abolish any grade crossings when required by public safety, or to require a separation of grades, or to require the reconstruction, alteration, relocation or improvement of any crossings (including the necessary highway approaches thereto) of any railroad across any highway or public road, and to apportion the cost of the same between the railroad company or companies and any other public utility and the state, county, municipality or other public authority in interest.

In the case of *Village of Atwood v. Cincinnati I. & W. R. Co.*, 316 Ill. 425, 147 N. E. 449, the Supreme Court held that the general powers granted by the Act creating the Illinois Commerce Commission were sufficient to repeal, by implication, that part of section 27 of article V of the Cities and Villages Act which granted to cities the power to require railroad companies to keep flagmen at railroad crossings of streets. In that case, the Supreme Court said:

“The Public Utilities Act enjoins obedience to the commission’s orders. That act is the later one, and covers the whole subject of promoting the safety of the public at the intersections of streets and railroads. It is complete in itself, and evidently was intended by the General Assembly to supersede the power conferred by subsection 27 of section 1 of article 5 of the general Cities and Villages Act to require railroad companies to keep flagmen at street crossings. While repeals by implication are not favored, yet, where two statutes are clearly repugnant to each other, the later one operates as a repeal of the former. *Illinois & Michigan Canal v. City of Chicago*, 14 Ill. 334; *Dingman v. People*, 51 Ill. 277; *Board of Water Com’rs v. Conkling*, 113 Ill. 340; *McCormick v. People*, 139 Ill. 499, 28 N. E. 1106; *People v. Town of Thornton*, 186 Ill. 162, 57 N. E. 841.”

Under the decision of the *Atwood* case and in view of the complete provisions of the Act creating the Illinois Commerce Commission relative to the grant of powers to provide for the relocation of grade crossings, it would seem clear that power to require track elevation has been conferred upon the Illinois Commerce Commission and has been taken away from municipalities.

In conclusion, we would suggest that whenever possible agreements be entered into with the railroad company providing for track elevation and that the Illinois Commerce Commission be then requested to approve the agreements.

In the event that the City is unable to agree with any particular railroad as to track elevation, it is suggested that a petition be prepared and addressed to the Illinois Commerce Commission, petitioning said Commission to require the elevation of the tracks in question.

(No. 6193—April 5, 1928—G. F. M.)

1 PENSIONS, WIFE AS "MURDERESS," ANNUITY.

The wife of a policeman who has been widowed by her own act for which she was tried and acquitted, is entitled to a widow's annuity under present statutes, if she would have been so entitled otherwise.

2 POLICEMEN'S ANNUITY AND BENEFIT FUND ACT.

Section 38 which excludes certain wives and widows from receiving annuities does not include a wife who has "murdered" her husband.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a widow to claim and to be paid a pension when her widowhood was occasioned by her own act, the following is submitted:

Your letter states that Mrs. Minnie Goranson, widow of Sergeant Vernon Goranson, has applied for annuity; that at the time of his death Sergeant Goranson had a service credit of sixteen (16) years, four (4) months and seven (7) days; that under ordinary circumstances his widow would be entitled to a minimum annuity of \$42.50 a month; that the records indicate that Sergeant Goranson was born April 11, 1879; that he was married to the present applicant on May 5, 1909; that Sergeant Goranson was in the service at the time he was shot; that he was shot by Mrs. Goranson, the applicant, on or about October 24, 1927; that she was indicted for murder and acquitted.

The Policemen's Annuity and Benefit Fund Act provides for annuity to the widows of policemen, excepting certain widows designated in section 38 of the Act as not being entitled to annuities. The wives or widows excluded from annuities by section 38 are classified as follows:

“(a) The wife or widow married subsequent to the date upon which this Act shall come in force and effect in such city, of any policeman who shall die while in the service if such widow shall not have been married to such policeman before he shall have attained an age of fifty-seven (57) years.

“(b) The wife or widow, married subsequent to the date upon which this Act shall come in force and effect in such city, of any policeman who shall have resigned or been discharged from the service and who shall or shall not have entered upon annuity and who shall die while out of the service, if such widow shall not have been the wife of such policeman while he was in the service and before he attained an age of fifty-seven (57) years.

“(c) The wife or widow of any policeman who shall have served ten (10) or more years, and who shall die while out of the service, after he shall have resigned or been discharged from the service, who shall have withdrawn or applied for refund of the sums to his credit for annuity purposes to which he shall have or shall have had a right of refund as provided in section 39 of this Act.

“(d) The wife or widow of any policeman who shall die while out of the service after he shall have resigned or been discharged from the service before he shall have attained an age of fifty-seven (57) years and who shall not have served at least ten years.”

The Policemen's Annuity and Benefit Fund is governed by the Act creating the fund, and as this Act designates the classes of widows who are not entitled to pension, and does not include the wife of a policeman who becomes a widow by reason of herself taking the life of her husband, it is not within the power of your Honorable Body to refuse

an annuity by injecting such a proviso into the Act. Until the Legislature sees fit to amend the Act so as to embrace a case of this kind, your Honorable Body will be required to pay annuity in this class of cases. In other words, the Act which creates the fund also directs how the fund shall be administered and specifies the classes of widows who shall not be paid annuities. Other than the classes specifically excluded, all widows of policemen otherwise entitled to annuities under the provisions of the Act must be paid the annuities provided therein.

Under the facts as presented, I am of the opinion that Mrs. Minnie Goranson is entitled to an annuity as the widow of Sergeant Vernon Goranson, in accordance with the provisions of the Policemen's Annuity and Benefit Fund Act.

(No. 6194—April 7, 1928—M. H. F.)

1 DEADLY WEAPONS, SALE, PERMIT.

Sawed-off shot-guns are primarily intended and used to inflict injury upon human beings and come within the provision of "other weapons of like character which can be concealed on the person" in the Deadly Weapon Ordinance requiring a permit to purchase them.

2 WORDS AND PHRASES.

A sawed-off shot-gun or a bank gun is a weapon which has reduced barrel and stocks shortened or removed to the pistol grips to permit its handling in close quarters and is capable of being concealed on the person.

Hon. Michael Hughes, Commissioner of Police:

In your communication of recent date you state that dealers in firearms in this City are in receipt of requests from banks and others to purchase short or "sawed-off" shotguns, such as are carried by the motorcycle crews of

your Department, but are afraid to comply with these requests without a permit from the Police Department, as required by law for revolvers or other weapons that can be carried concealed on the person. You request the advice of this Department as to whether the permit in question is required in such cases.

Section 1255, of the chapter entitled "Sale of Deadly Weapons," of the Chicago Municipal Code of 1922, provides:

"It shall be unlawful for any person, firm or corporation to engage in the business of selling, or to sell or give away to any person, within the city, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without securing a license so to do as hereinafter provided."

Section 1257 requires the making and delivery* to the Superintendent of Police of a daily report by the dealer in such weapons, said report to contain the name of purchaser, kind and description of weapon, etc. Sections 1259 and 1260 are as follows:

"It shall be unlawful for any person, firm or corporation to sell, barter or give away to any person within the city of Chicago, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person, except to licensed dealers and to persons who have secured a permit for the purchase of such articles from the superintendent of police as hereinafter required; provided, this section shall not apply to sales made of such articles which are to be delivered or furnished outside the city of Chicago.

"It shall be unlawful for any person to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without first securing from the superintendent of police a permit so to do. Before any such permit is granted, an application in writing shall be

made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality and other elements of identification, of the person desiring such permit, and the applicant shall present such evidence of good character as the superintendent of police in his discretion may require.

"It shall be the duty of the superintendent of police to refuse such permit to (a) all persons having been convicted of any crime; (b) all minors.

"Otherwise, in case he shall be satisfied that the applicant is of good moral character, it shall be the duty of the superintendent of police to grant such permit, upon the payment of a fee of two dollars."

Section 1261 prohibits the display of such weapons, and section 1263 requires the keeping of a dealer's register of all such weapons sold, etc.

We understand "sawed-off" shotguns to be weapons of large bore, designed to shoot shotgun shells, usually 20, 16 or 12 guage, which have the barrels reduced substantially in length and the stocks shortened or removed to the pistol grips, so as to render the weapons capable of being more readily handled in close quarters. The term would also cover the so-called "bank guns" now being produced by certain firearms manufacturers, which weapons are a cross between a shotgun and a pistol in that they have a short shotgun double or single barrel, approximately 10 to 12 inches in length, assembled to a one hand pistol grip or stock. They weigh approximately 4½ lbs., and shoot 20 guage shell ammunition. They can be carried concealed under a man's sack coat in a leather holster with shoulder strap. The apparent purpose in reducing the overall length of the weapon is that of concealment, to produce a firearm of large bore, capable of firing a spreading charge of shot, yet one which may be concealed upon or about the person.

The legal question presented by your inquiry is whether the so-called "sawed-off" shotgun is a weapon in character like "pistol," "revolver," or "derringer," which can be concealed on the person, so as to bring it within the classification found in the sections of the Code which reads "any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person."

It is a well settled rule of construction that where general words follow particular and specific words in a statute, the general words must be construed to include only things of the same kind or class as those indicated by the particular and specific words. (*People v. Sheldon*, 322 Ill. 70.) This is the doctrine of "*ejusdem generis*," a doctrine, however, which is only a rule of construction to be applied as an aid in ascertaining the legislative intent and does not control where it clearly appears from the statute or enactment as a whole that no such limitation was intended. 2 Words and Phrases, 2d series, 226.

In *Drainage Commission v. National Contracting Co.*, 136 Fed. 780, it was said:

"The rule *ejusdem generis*, the rule *exclusio unius*, the rule invoked in this case that 'the particular governs the general,' and perhaps other rules still, are mere subordinate and auxiliary formulas intended to assist in the application of the basic rule that the intent of the parties governs. Neither in law nor in ordinary logic can there be an inflexible rule by which parties are arbitrarily held to forego a general requirement merely because they also state a particular one."

While a standard shotgun might not be held to be a weapon in character like a pistol, revolver, or derringer, we are inclined to the belief that the courts, applying the doctrine of *ejusdem generis*, would consider a shotgun

which had been manufactured or altered to a size convenient to be carried on and concealed about the person of an individual to be a weapon of the same general kind or character as certain of the weapons particularly mentioned in the Code. We see no good reason why the ordinance should be restricted to only such deadly weapons as are specifically named when it plainly says, "other weapon of like character which can be concealed on the person." The ordinance is protective in its nature and wholesome in effect. Its validity has been upheld by the Illinois Supreme Court in *Biffer v. City of Chicago*, 278 Ill. 562. The standard shotgun is habitually employed for such useful and ordinary purposes as protecting crops and procuring game, and had the lawmakers intended to include it in the prohibited list, it is extremely unlikely they would have failed to mention it; but the "sawed-off" shotgun is a deadly weapon primarily intended and used to inflict injury upon human beings, and generally speaking, serves no worthy purpose but the quite exceptional one of self-defense.

We are, therefore, of opinion that the City Council, in passing the ordinance in question, intended to restrict the sale of deadly weapons, small enough to be concealed on the person and which were primarily intended and used to inflict injury upon human beings; and it is our opinion that the provisions of the ordinance requiring a permit to purchase should be enforced in respect to the so-called "sawed-off" shotgun which is in fact of a size small enough to be concealed on the person of an individual.

(No. 6195—April 7, 1928—L. H.)

1 APPROPRIATIONS, VOUCHERING.

It is lawful for the Board of Local Improvements or any other department of the City government to voucher against appropriations for the payment of warrants, unless notified by the Comptroller that the funds required for payment are not available.

2 COMPTROLLER, POWER, FUNDS NOT AVAILABLE.

The Comptroller is required to so handle the City funds as not to embarrass its officers, but if he finds it impracticable to secure the necessary money for a specific purpose, he may direct that no checks shall issue against a particular warrant.

Hon. Michael J. Faherty, President, Board of Local Improvements:

In your letter of recent date you make inquiry concerning your right to draw checks for the payment of awards to owners of condemned property out of warrants duly appropriated for but for which the money is not immediately available, the voucher for such warrants having been made in accordance with the appropriation.

It appears that the City Council, in making appropriations for the payment of public benefits out of any particular warrant, does not specify the individual amounts to be paid therefrom but appropriates a sum covering the entire obligation of the City on the warrant. The appropriation in such cases reads, "For payment of public benefits Warrant No." The Board of Local Improvements then makes its voucher for the entire amount, which is taken from the bond fund or the general corporate fund, as the case may be, and placed to the credit of the warrant. The Board is then in a position to issue checks against this sum, in the same manner that pay-roll checks are issued against the money set apart for that purpose after a pay-roll warrant has been drawn for a pay-roll out

of which the individual salaries are paid by the issuance of checks.

The precise question which you want answered, as we understand it, is whether you can issue checks against the warrant if for some reason the money which should be standing to the credit of the warrant is not yet available, as for instance in case the bonds have not been sold or if there is a shortage of funds which makes it inexpedient to draw money from the general corporate fund for the warrant. The question is no doubt prompted by reason of the inhibition against officers of the City incurring expenditures without an antecedent appropriation (art. VII, sec. 4 of Cities and Villages Act) and the criminal statute making it a misdemeanor for a public officer to divert funds from the use to which it was appropriated or expending a larger amount than the sum appropriated. Section 208 of Criminal Code.

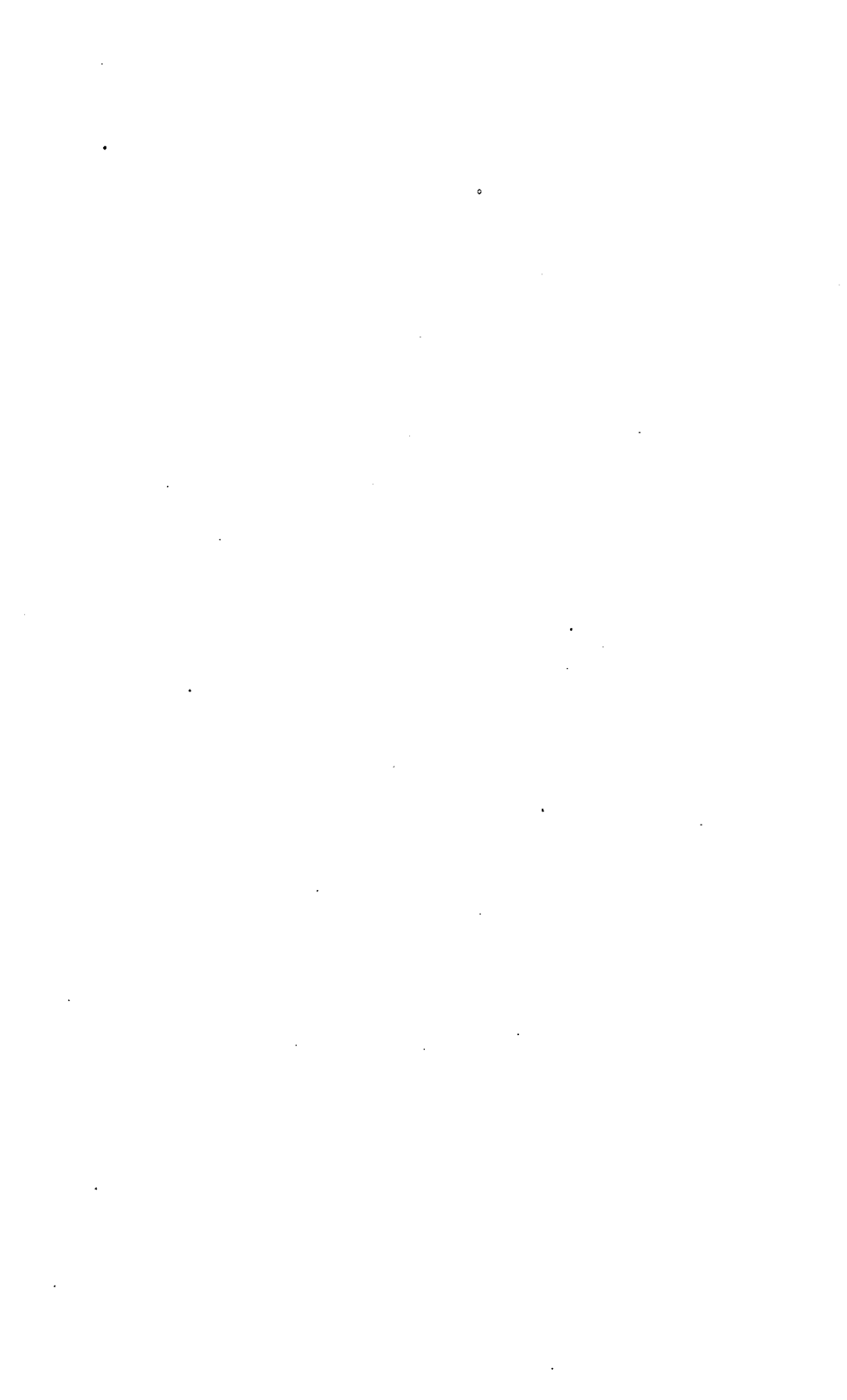
Neither of the statutes mentioned has any bearing on the situation as outlined above. The head of the department of the City government for which an appropriation is made has the right to assume that the money is available when the appropriation ordinance becomes operative.

In your case the Board of Local Improvements is justified in proceeding to make its voucher against the appropriation for the payment of the warrant, as it has done. Then the Board may act on the assumption that the money has been paid over and placed to the credit of the warrant unless the City Comptroller notifies it to the contrary.

The Comptroller, under the general powers given him by statute (Cities and Villages Act, art. VII, sec. 17) may direct that no checks shall issue against a warrant if he finds it impracticable to secure the necessary money and set it apart for such purpose, but he is not supposed to

act arbitrarily in such a case or to unnecessarily delay the placing of the money to the credit of the warrant. In other words, the Comptroller is not given any power to set at naught the direct order of the City Council in making the appropriation, but is authorized merely to so handle the finances that the City and its officers may avoid the embarrassments that would result from an uncontrolled handling of the City's funds.

We, therefore, advise you that it is entirely legal for the Board of Local Improvements to proceed to make payments out of the warrants in question unless notified by the Comptroller that the funds required for the payments are not available.



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